IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-153

UNITED STATES OF AMERICA,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION and HONORABLE DAMON J. KEITH,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE DISTRICT COURT AND THE HONORABLE DAMON J. KEITH

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OPINIONS BELOW

The opinions of the court of appeals and of the district court are set forth at pp. 23-85 of the Transcript of Record; the opinion of the court of appeals is reported at 444 F. 2d 651.

JURISDICTION

On June 21, 1971, this Court granted the Government's petition for a writ of certiorari, under 28 U. S. C. 1254(1), to review the decision of the United States Court of Ap-

peals for the Sixth Circuit denying the Government's petition for a writ of mandamus to compel the respondent District Judge Damon J. Keith to vacate a pretrial order in a pending criminal case.

Questions Presented

I. Whether electronic surveillance that the Attorney General authorized to gather "intelligence information" he deemed necessary to protect the "national security" from domestic organizations is an unreasonable search and seizure when conducted without prior judicial approval.*

II. If such national security surveillance is unlawful, whether—notwithstanding *Alderman* v. *United States*, 394 U. S. 165—it would be appropriate for the District Court to determine *in camera* whether the interceptions are arguably relevant to the prosecution before requiring their disclosure to the defendant.

Constitutional Provisions and Statutes Involved

The pertinent provisions of the First, Fourth and Fifth Amendments to the Constitution, of the Federal Communications Act of 1934 and of the Omnibus Crime Control and Safe Streets Act of 1968 are set forth in the Appendix, *infra*.

Statement

On October 7, 1969, the defendant Plamondon was indicted by a federal grand jury in the Eastern District of Michigan for conspiring to destroy property of the United

*This statement is a further narrowing of the first question presented in the Government's petition for certiorari, and narrowed in its brief.

States, and for the destruction of such property in violation of Title 18, United States Code, sections 371 and 1361. Plamondon, and his co-defendants, who were charged with participation in the conspiracy, moved on October 5, 1970, for disclosure of certain electronic surveillance information, and for a hearing to be held to determine whether any of the evidence upon which the indictment was based or which the Government intended to introduce at the trial was tainted by such surveillance.

The Government responded on December 18, 1970, admitting that federal agents had in fact overheard conversations in which Plamondon participated, and it filed an affidavit of the Attorney General of the United States, John N. Mitchell, which acknowledged the wiretaps, asserted that they "were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government," and stated that the wiretap installations "had been expressly approved by the Attorney General." The records of the intercepted conversations, along with copies of the memoranda reflecting the Attorney General's express approval of the installations, were submitted to the District Court in a sealed exhibit for *in camera* inspection.

The Government conceded that no neutral judicial officer was asked to approve the wiretaps either before they were installed or during the extensive period they were employed. And it made no claim that an emergency or other circumstance existed that made it impracticable or even difficult to secure prior judicial approval. Rather, the Government asserted, the legality of such surveillance is an issue "peculiarly within the area of executive rather than judicial competence and, therefore, is the type of decision which should not be subject to judicial review in a warrant proceeding. . . . Since the executive branch alone

possesses both the expertise and the factual background to assess the reasonableness of such a surveillance, the courts should not question the decision of the executive department that such surveillances are reasonable and necessary to protect the national interest." Gov't Memorandum, filed Dec. 10, 1970, pp. 6-7. The notion of probable cause and judicial participation were claimed to be irrelevant to searches engaged in to gather intelligence information as distinguished from searches to produce evidence for use in proving crime.

Judge Keith rejected these contentions and held the surveillance illegal, pointing out that the Attorney General's affidavit did not even allege that "unlawful means" were being employed. Transcript of Record, p. 31. He granted the defense motion, and ordered the Government to disclose the information sought. The Government was granted a stay of the disclosure order, however, and filed in the Court of Appeals for the Sixth Circuit for a writ of mandamus to compel Judge Keith to vacate the order. The Sixth Circuit held that mandamus was appropriate,* but denied relief on the merits. The Government's petition for a writ of certiorari to review that judgment was granted on June 21, 1971, 403 U. S. 930.

SUMMARY OF ARGUMENT

I.

This case is controlled by the rule in *Katz* v. *United States* that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." No recognized exception applies, and the Govern-

*Respondents do not contest this conclusion.

ment cannot justify its failure to obtain a warrant in this case by analogy to any recognized exception.

While the Fourth Amendment does not prohibit all warrantless searches, its governing principle is that such searches are unreasonable except in carefully defined classes of cases. This principle is deeply rooted in our history. The Fourth Amendment was adopted to require all searches for which warrants were used to comply with the prerequisites of common-law judicial warrants, including particularity in describing the subjects of a search and their location; probable cause to believe a crime had been, or was being, committed; and review by a neutral magistrate before the search occurred. These prerequisites were designed to protect the innocent, and were placed in the Bill of Rights to prevent their displacement through legislative action.

The Government bears a heavy burden to justify creating a new exception to the warrant requirement. It is a burden not just to show a need to search, but a need to search without warrant. Existing exceptions to the warrant requirement provide no support for the power sought in this case. The executive has broad authority to gather information to protect society, including the power to search in connection with crimes covering every conceivable threat to national security, and to eavesdrop without warrant in emergencies under the Omnibus Crime Control and Safe Streets Act of 1968. The President must exercise his powers through constitutional means. He is sworn, not to protect the government as such, but to "preserve, protect and defend the Constitution of the United States."

"Information gathering" through electronic surveillance is more, not less, threatening to privacy and protected freedoms than conventional searches undertaken to prove specific crimes. Electronic "information gathering" is ex-

tremely indiscriminate in scope. By its nature, and because of the devices used, "information gathering" is not limited to obtaining any specific evidence of any crime by any person. Such searches are implemented without probable cause, simply on the basis of the Attorney General's judgment. The nation's chief prosecutor cannot provide the neutral review that the Constitution requires. So broad is the standard under which the Government claims to have acted, that searches pursuant to it are likely to chill free expression and other protected activity. More discriminate means for regulation are available. The Government's argument that few persons surveilled will be prosecuted on the basis of information collected misses the point. It is disingenuous to classify as "intelligence gathering" searches that are capable of producing usable evidence. And in any event, the Fourth Amendment was written to protect those of us who are not prosecuted for crime, not just those who are.

After-the-fact review under the most exacting standards would not satisfy Constitutional principles. The real evil aimed at by the Fourth Amendment is the search itself. Not only does the Government suggest after-the-fact review, however; it contends that the review must be extremely limited, on the basis of an "arbitrary and capricious" standard, in which particular searches would not be scrutinized. The proposed scheme is patently deficient, and would leave enormous, unchecked power in political hands.

Requiring warrants for electronic surveillance would not frustrate any legitimate government objective. Disclosure to courts of information necessary to judge the reasonableness of such surveillance poses little danger, and leaks can be prevented through special precautions. Not all information connected with a "national security" search need be disclosed. Warrants may issue on hearsay, and the identity of informers may be withheld. Courts are well

suited to consider complicated fact situations, and to draw inferences. They are obliged to do so where constitutional rights are at stake. And Congress contemplated that they would do so, by providing for judicial supervision of electronic searches in connection with national security crimes. That the Attorney General will personally authorize each surveillance, and that Congress may provide some oversight of his judgments, is desirable, but perfectly consistent with a judicial role.

Prior surveillance practice has varied, and therefore cannot support the present claim. It was based, moreover, on the theory that wiretapping could be conducted, so long as no divulgence occurred. Until this case, the Government has consistently conceded that the fruits of warrantless wiretraps are inadmissible at criminal trials. Congress has taken no action that supports so extreme a departure from this established rule. Section 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968 is neutral on the issue whether the President does have power to eavesdrop on domestic activities. Assuming, *arguendo*, that the Act did recognize some such special power, the present search is unlawful because the Attorney General authorized it to gather "intelligence information," where neither force nor unlawful means was claimed to be threatened.

Whatever authority the President may have to utilize warrantless electronic surveillance with respect to foreign powers cannot be invoked to support this domestic search. Special power in foreign affairs is recognized only where domestic rights can remain protected. The distinction between foreign and domestic activities is well established, and is a serviceable guide for all branches of government. Any ambiguity that the distinction may pose in other cases need not be considered here, where the purely domestic character of the surveillance is conceded.

II.

Alderman v. *United States* requires that the relevance of illegally seized evidence to a prosecution be determined with the full participation of a defendant aggrieved by the search. This is a rule of constitutional dimension, recently established after thorough consideration of all relevant arguments. Federal courts cannot properly determine relevance *ex parte*. Nor should they do so. Any inconvenience caused the Government through disclosure is of its own making. This is not to say that defendants should be allowed to rummage through Department of Justice files. *Alderman* requires only that the conversations in which the defendant was overhead be disclosed. The most effective way to protect the innocent from harmful disclosures would be to spare them from illegal intrusions.

This Court has already determined that the *Alderman* principle applies to "national security" surveillance. Disclosure is especially important in such cases. The exclusionary rule will work effectively to deter unlawful eavesdropping authorized by the Attorney General, and public awareness of how the government exercises its wiretapping powers will be enhanced.

The Omnibus Crime Control and Safe Streets Act of 1968 supports disclosure as ordered in *Alderman*. Indeed, it allows disclosure in adjudicating the legality of a search, and even before a motion to suppress has been made. Section 2511(3) specifically provides that only reasonably seized material can be used as evidence, and *Alderman* established the constitutionally required method for determining whether the prosecution's case is tainted by the use of inadmissible material. The Organized Crime Control Act of 1970 is inapplicable to the instant search, and its history is inadequate to change the clear import of the 1968 Act, especially in light of the Congressional policy favoring disclosure of defendants' statements.

ARGUMENT

I.

ELECTRONIC SURVEILLANCE THAT THE ATTORNEY GENERAL AUTHORIZED TO GATHER "INTELLIGENCE INFORMATION" HE DEEMED NECESSARY TO PROTECT THE "NATIONAL SECURITY" FROM DOMESTIC ORGANIZATIONS IS AN UNREASONABLE SEARCH AND SEIZURE WHEN CONDUCTED WITHOUT PRIOR JUDICIAL APPROVAL.

INTRODUCTION

This case is controlled by the rule in *Katz* v. *United States*, 389 U. S. 347, 357 (1967); that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." The fruits of unreasonable searches and seizures are inadmissible in evidence in criminal trials. *Weeks* v. *United States*, 232 U. S. 383 (1914).

The Government does not claim that the search undertaken in this case was justifiable under any existing exception to the warrant requirement. Nor does it reason by analogy that the rationale behind the existing exceptions would support a proposed "national security" exception. It seeks, instead, a new exception to the warrant requirement; indeed, it seeks for all searches the Attorney General labels "national security" a complete exemption from any meaningful judicial scrutiny either before or after the searches are undertaken.

There are several fundamental distinctions between this case and other conceivable situations in which the legality of warrantless surveillance may be tested. First, the surveillance here was not based upon probable cause to believe that unlawful acts relating to the nation's security had been, or would be, committed; it was ordered because the

Attorney General unilaterally "deemed" it necessary to gather "intelligence information." Second, this case involves a special and extraordinarily vague aspect of "national security." The surveillance was undertaken to secure information about "attempts of *domestic organizations* to attack and subvert the existing structure of the Government." Gov't Brief, p. 3. (Emphasis added.) This is not therefore a case where our national security was said to be threatened by foreign spies. Third, no reason of substance is advanced to excuse the Government's failure to secure a warrant for this search. And all the reasons advanced for avoiding the courts before surveillance are in fact reasons for precluding any meaningful judicial role even after surveillance. Fourth, it is essential to focus on the remedy granted by the District Court in this case—an order that the fruits of the surveillances must be disclosed to defendant Plamondon. Not presented, for example, is the question whether the federal courts could or should enjoin or otherwise affirmatively prohibit any search that the President or his chief law enforcement officer decides must be carried out. Finally, even assuming that the Government's arguments are all correct, the present search is unlawful because the Attorney General's affidavit failed to allege that the activities surveilled potentially involved the use of force or other unlawful means. See discussion, *infra* at 64-65.

To justify its position, the Government engages in a line of argument strangely and dishearteningly lacking in recognition of the legal fabric woven by the founding fathers and by this Court to protect our fundamental liberties. One might think, in reading the Government's brief, that we had no pertinent history to help resolve this profound question. One might infer, from the Government's proposed remedy of limited post-surveillance judicial supervision through motions to supress, that the Fourth Amendment was written solely to protect the privacy of the

criminally accused. And one might assume, from the Government's alleged "balancing" process, that the President would be rendered powerless to protect us if denied the extreme authority sought in this case.

Actually, we have a rich heritage of history and judicial experience that is highly germane to the issue before this Court. The Fourth Amendment was written to protect the privacy of all citizens, not just the criminally accused, and is of special relevance to searches that potentially inhibit free expression and association. And the Government's claim that virtually untrammeled power to search electronically is essential to the national security is an unworthy appeal to fear. The President has a vast arsenal of powers to protect the national security, including recent statutory authority to eavesdrop without a warrant in emergencies.

A. The Warrant Requirement Plays the Central Role Under the Fourth Amendment in Controlling Executive Power.

The Government's argument is essentially a two-step process. First, it seeks to establish that the test for determining reasonableness under the Fourth Amendment is a "weighing of the competing interests involved." Gov't Brief, p. 11. It contends that "the Fourth Amendment does not prohibit all searches and seizures without a warrant, but only unreasonable ones." *Id.* at 23. Then it purports to "balance" the interests and finds that "the governmental interest in protecting national security" outweighs the invasion of personal rights resulting from the surveillance. *Id.* at 15.

The Government's initial premise is faulty. Determining whether a search is "unreasonable" involves more than the weighing of interests. The process must begin with the "one governing principle, justified by history and by current experience, [that] has consistently been fol-

lowed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court,* 387 U. S. 523, 528-29 (1967). The warrant requirement is not merely one method of assuring that a search under the Fourth Amendment is reasonable, as the Government suggests; rather, the very words of the Constitution "mandate . . . adherence to judicial processes," *United States* v. *Jeffers,* 342 U. S. 48, 51 (1951). Analysis must begin with the premise that "the general requirement that a search warrant be obtained is not lightly to be dispensed with, and 'the burden is on those seeking [an] exemption [from the requirement] to show the need for it. . . .' *United States* v. *Jeffers,* 342 U. S. 48, 51." *Chimel* v. *California,* 395 U. S. 752 (1969); *Vale* v. *Louisiana,* 399 U. S. 30, 34 (1969).

The warrant requirement is as old as this nation's freedom. It stemmed largely from two experiences, vivid in the minds of the framers and highly instructive on the present issue. First, was the effort in 1763 by the British Secretary of State, the equivalent of our Attorney General, to issue what became known as "general warrants" to search persons and places for evidence of seditious libels which the Secretary had determined were threatening to Britain's national security. The searches authorized at that time led to a series of decisions, culminating in *Entick* v. *Carrington,* XIX How. St. Tr. 1029 (1763), and *Wilkes* v. *Wood,* XIX How. St. Tr. 1154 (1763), in which those executive warrants were held unlawful. Second, was the issuance in this country of so-called writs of assistance in connection with searches for uncustomed goods. These were attacked by leaders of the generation of Americans who drafted our Constitution for many of the same reasons that led Chief Justice Pratt (later Lord Camden) and Lord Mansfield to declare invalid the general

warrants issued by the British Secretary of State. See generally, Taylor, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION, 29-34 (1969); Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, 42-50 (1937). An examination of the oppposition to general warrants and writs of assistance shows why the judicial warrant is so fundamental.

First, both the executive warrant issued in England to search for and seize libels, and the writ of assistance issued in colonial America to search for and seize untaxed goods, authorized extremely broad actions by the executing officers. The earlier warrants authorized a search for the printers and publishers of certain pamphlets claimed to be libelous, and directed that such persons be arrested; that their papers be seized; and that they be brought before the Secretary of State to face charges. The persons to be arrested were not identified. The places to be searched were not described. There was no time limit. And the seizure was to extend to "all" the papers of arrested individuals, libelous or not. *Entick* v. *Carrington, supra* at 1065. For the same reasons, writs of assistance were condemned in this country by James Otis and others. They allowed the executing officer "to seize any illegally imported goods or merchandise," and to search anywhere for such goods, at any time during the period from the issuance of the writ until six months after the death of the sovereign during whose reign it issued. And as Otis observed, entry under the writs could be made on "bare suspicion without oath." Wroth & Zobel, eds., LEGAL PAPERS OF JOHN ADAMS, 141-44, (1965).

Second, executive warrants and writs of assistance permitted invasions of homes and private places of subjects without any predetermination that the invasion was supported by evidence. This practice made it far more likely that the *innocent* would be subjected to arbitrary searches and seizures. "[T]he secret cabinets and bureaus of every

subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer or publisher of a seditious libel." *Entick* v. *Carrington, supra* at 1063. The power claimed could act "against every man, who is so described in the warrant, though he be innocent. It is executed against the party, before he is heard or even summoned; and the information, as well as the informers, is unknown. . . . If this injury falls upon an innocent person, he is as destitute of remedy as the guilty . . ." *Id.* at 1064-65. The same danger existed in connection with writs of assistance. For though they were judicially issued, each was a blanket authorization to search for and seize uncustomed goods. See Lasson, *supra* at 60.

The legality of general warrants and writs of assistance was challenged by contrasting their characteristics with those of the common-law warrant judicially issued to recover stolen goods.[1] In rendering the court's judgment in *Entick,* Chief Justice Pratt relied on the striking lack of protection provided by general warrants as compared to stolen-goods warrants.[2] The common law also required that

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[1]"It is both striking and enlightening that independently, in London and Boston, the opponents of the warrants based their attack primarily on unfavorable comparisons with the stolen goods warrants." Taylor, *supra* at 40.

[2]"Observe too the caution with which the law proceeds in this singular case [of stolen goods]. —There must be a full charge upon oath of a theft committed. —The owner must swear that the goods are lodged in such a place. —He must attend at the execution of the warrant to show them to the officer, who must see that they answer the description. —And lastly, the owner must abide the event at his peril. . . . On the contrary, in the case before us nothing is described, nor distinguished: no charge is requisite to prove, that the party has any criminal papers in his custody: no person present to separate or select. . . ." XIX How. St. Tr. at 1067. See also counsel's argument, *id.* at 1039. Otis, too, attacked the writ of assistance because of its unfavorable contrast to the common-law warrant for stolen goods, pointing out that the writ allowed searches anywhere, at any time, and required no return. Lasson, *supra* at 59-60.

the supporting evidence be judicially tested *before* each search occurred. Common law principles, Lord Mansfield held, prohibited warrants that ordered the arrest of unnamed individuals whom the officer might conclude were guilty of seditious libel. "It is not fit, that the receiving or judging of the information should be left to the discretion of the officer. The *magistrate* ought to judge; and should give certain directions to the officer." *Leach* v. *Three of the King's Messengers,* XIX How. St. Tr. 1001, 1027 (1765). (Emphasis added.)

Yet another lesson of Fourth Amendment history lies, not in what *Entick* and *Wilkes* established, but in what they could *not* establish. The founding fathers were well aware of the inherent weakness of those historic decisions. In England's constitutional system Parliament was, and is, supreme. Lord Camden, Lord Mansfield and others were able to apply common-law principles to the warrants issued by the Secretary of State only because no statute authorized his actions. Had the general warrants been authorized by statute, they would have been upheld.[3]

Americans soon learned on how weak a foundation the English common-law warrant requirement was built. James Otis lost his case. The writ of assistance was upheld on the ground that it had been authorized by act of Parliament. The same doctrine of legislative supremacy that the founding fathers knew had allowed laws regulating speech, reli-

[3]Statutes authorizing general warrants, to be issued by executive officers, were in fact common, especially during the 17th century. Even as the courts were developing principles to limit both the occasion and scope of non-statutory searches and arrests, Parliament was authorizing general warrants in a variety of situations. The Licensing Act provided for virtually the same sort of warrants that were declared invalid in *Entick* and *Wilkes;* but the Act had expired in 1695. True it is that some Parliaments restricted the use of general warrants, and that *Entick* and *Wilkes* were ultimately hailed and approved by the legislature then in power. But Parliament's position continued to change radically as it had in the past. And even the brilliant and persistent advocacy of William Pitt could not make lasting the victory against general warrants. See generally Lasson, *supra* at 23-50.

gion, and all else of value also permitted laws that rendered ineffective the protections of persons and things hammered out in the courts over centuries of experience.

"This bleak recital of the past was living experience for Madison and his collaborators. They wrote that experience into the Fourth Amendment, not merely its words." *Davis* v. *United States*, 328 U. S. 582, 604 (1946) (dissenting opinion of Frankfurter, J.). The dangers associated with general warrants were dealt with by adopting as constitutional principle not subject to legislative or executive whim the protections of the common-law judicial warrant. Overbroad searches, inadequately justified, and authorized by the executive, were prevented by prohibiting warrants "but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Amendment IV, U. S. Const.[4] Neutral administration was assured through an independent judiciary. And by requiring a detached magistrate's judgment *before* the search occurs, the innocent would receive protection.

The Government would ignore this history and the rule of *Katz* that warrantless surveillance is *per se* unreasonable, unless some recognized exception is applicable. We are advised, in a mere play on words, that "the Fourth Amendment does not prohibit all searches and seizures without a warrant, but only unreasonable ones." Gov't Brief, p. 5.[5] Of

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[4]The fight for a Bill of Rights, and for the Fourth Amendment in particular, is instructive. Patrick Henry, among others, pressed the need to protect "personal rights" against Congressional and executive conduct, citing as his example the use of "general warrants, by which an officer may search suspected places, without evidence of his crime . . ." III ELLIOT'S DEBATES 588 (1836). See Lasson, *supra* at 79-105.

[5]This argument implies that "reasonable" searches, without a warrant and without more, are perfectly proper and thus that warrants are required only for "unreasonable" searches; which is the same as saying that warrants simply are not required, since "unreasonable" searches are unlawful under the Fourth Amendment, with or without a warrant.

course, the Government's statement is accurate, so far as it goes. But the next step—that warrantless searches are unreasonable unless they fall within a recognized exception—is as much a part of the experience written into the Fourth Amendment as the requirements of "probable cause" and particular description. "The forefathers . . . were guilty of a serious oversight if they left open another way by which searches legally may be made without a search warrant and with none of the safeguards that would surround the issuance of one." *Davis* v. *United States, supra* at 196 (dissenting opinion of Jackson, J.). As Mr. Justice Frankfurter pointedly observed in *United States* v. *Rabinowitz,* 339 U. S. 57, 70 (1950) (dissenting opinion):

> One cannot wrench 'unreasonable searches' from the text and context and historic content of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed 'unreasonable.' Words must be read with the gloss of the experience of those who framed them. Because the experience of the framers of the Bill of Rights was so vivid, they assumed that it would be carried down the stream of history and that their words would receive the significance of the experience to which they were addressed—a significance not to be found in the dictionary.

The views of Justices Jackson, Frankfurter and others concerning the fundamental importance of the warrant requirement have been adopted in several recent decisions. *Vale* v. *Louisiana, supra* at 34; *Chimel* v. *California, supra* at 765; *Katz* v. *United States, supra* at 357; see Landynski, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 63 (1966); Lasson, *supra* at 120.

It should be clearly understood and emphasized, however, that the controversy dramatically posed by the decisions in *Rabinowitz* and *Trupiano* v. *United States*, 334 U. S. 699 (1948), has little or nothing to do with the case now before this Court. *Rabinowitz*, *Davis* and *Chimel*, as well as *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971), *Harris* v. *United States*, 390 U. S. 234 (1968), and other cases in which the legality of warrantless searches has been adjudicated, involved searches incident to lawful arrests or to some other action that arguably made relevant some recognized exception. The Government's argument here is radically different. The Fourth Amendment was primarily written to protect against general warrants, not searches pursuant to lawful arrests.[6] While the *scope* of warrantless searches poses important questions, an even more critical issue is posed here.

The Government claims the power to search our homes and other private places, and secretly to intrude upon our speech, even though we may have done or planned nothing to justify an arrest or other lawful detention. There is obviously a vast difference, for example, between claiming the power to search Room A pursuant to a lawful felony arrest in Room B, on the one hand, and claiming the far broader power to search both Rooms A and B—and, indeed, all rooms and all places—even though no lawful arrest has taken place, anywhere. The Government's claim for a new exception is by far the more sweeping. And it is wrong. While there may have been controversy in this Court over the scope of recognized exceptions, no serious challenge has been directed at the "crucial rule," *Chimel* v. *California*,

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[6] "The framers did not . . . [prohibit as unreasonable all warrantless searches] because their prime purpose was to prohibit the oppressive use of warrants; and they were not at all concerned about searches without warrants. They took for granted that arrested persons could be searched without a search warrant, and nothing gave them cause for worry about warrantless searches." Taylor, *supra* at 43.

supra at 761, that searches and seizures must be made pursuant to lawful warrants, or they are unreasonable.[7]

B. No New Exception to the Warrant Requirement Should be Recognized for "Intelligence Gathering" Surveillance of Domestic Activities Deemed Threatening to the "National Security."

The Government attempts to exempt "national security" surveillance from the warrant requirement by weighing "the governmental interest in protecting national security" against the resulting invasion of personal rights. Gov't Brief, p. 15. It argues that the President must gather "intelligence" information to perform his duty to protect the national security; that "intelligence gathering" is a less objectionable form of search than searches primarily intended to secure evidence of crime; and that to require a warrant would frustrate the governmental purpose of such surveillance. The Government contends, moreover, that warrantless electronic "intelligence gathering" is a long-established practice, authorized by every President since 1940, and that Congress has "recognized" the President's power to engage in such surveillance with respect to domestic activities deemed threatening to the national security. Finally, it asserts that, since it is impossible and pointless to distinguish between foreign and domestic threats, the President should have the same power to eavesdrop in both types of situations.

If balancing should be done, it must be done honestly. The Government's "balancing" assumes that the nation's physical security can be equated with the power to introduce at criminal trials evidence gathered through warrantless electronic intelligence surveillance undertaken without

[7] "Congress has never passed an act purporting to authorize the search of a house without a warrant. . . . Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant." *Agnello* v. *United States*, 269 U. S. 20, 32-33 (1925).

any demonstration of probable cause. On the other hand, it assumes that the only invasion of personal rights to weigh against the interest in allowing the introduction of the fruits of such surveillance is the invasion of a complainant's personal privacy, made even less significant when his own telephone has not been tapped. See *id.* at 13. Given these unsupported and untenable assumptions, the Government inevitably reaches its ultimate, sweeping assertion that "the possibility of . . . abuse . . . is not a valid basis for denying the Attorney General the authority." *Id.* at 35.

1. There is a heavy burden on the Government to show, not only a need to search, but a need to search without warrant.

Authority "to conduct searches without a warrant in certain situations is well established." Gov't Brief, p. 12. But these warrantless searches are justified, not solely on the need to search, but more specifically on the need to search without warrant. They are *exceptions*, not alternatives, to the warrant requirement.

Searches incident to arrests, stop-and-frisks, searches of vehicles, and hot-pursuit situations are exceptions to the warrant requirement because of the practical needs of law enforcement officers to protect their physical well being, *Terry* v. *Ohio*, 392 U. S. 1, 23 (1968); *Hayden* v. *United States*, 387 U. S. 294, 298-99 (1967); to prevent suspects from using hidden weapons to escape from custody, *Chimel* v. *California*, *supra* at 763; to preserve evidence from destruction or removal beyond the officer's reach, *Schmerber* v. *California*, 384 U. S. 757, 770 (1966); *Warden* v. *Hayden*, 387 U. S. 294, 299 (1967); *Carroll* v. *United States*, 267 U. S. 132, 153 (1925); *Brinegar* v. *United States*, 338 U. S. 160, 164 (1949); *Cooper* v. *United States*, 386 U. S. 58, 60 (1967); *Chambers* v. *Maroney*, 399 U. S. 42, 50-51 (1970), or to respond to an emergency, *McDonald*

v. *United States,* 335 U. S. 451, 455 (1948). To be lawful, moreover, even these searches must be based on probable cause.

Customs searches and the seizure of contraband goods under civil process present other exceptions relied on by the Government. But the very cases cited in its brief evidence the special character of such searches. In *Boyd* v. *United States,* 116 U. S. 616 (1886), the Government argued that the compulsory process served in that case was justified by analogy to the long-established practice of examining ships and vessels to find and seize untaxed goods. The Court rejected the argument, stating that customs searches "are totally different things from a search for and seizure of a man's private books and papers . . . ." *Id.* at 623. Customs searches and searches for stolen or forfeited goods had long been authorized by the common law; and since the first statute authorizing such searches "was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable' . . . ." *Id.*

Historical practice, and the governmental need to regulate revenue collection without prior judicial supervision, also justified the civil distress warrant upheld in *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 59 U. S. (18 How.) 272, 285 (1855).[8] "Border searches"[9] are distinguishable on the additional ground that obtaining warrants would be impracticable. Customs laws can only be

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[8]The Court held that the Fourth Amendment "has no reference to civil proceedings for the recovery of debts . . .," *id,* and stressed the special character of the debtor—a revenue collector, *id.* at 278-79.

[9]*United States* v. *Johnson,* 425 F. 2d 630 (9th Cir. 1970); *Walker* v. *United States,* 404 F. 2d 900 (5th Cir. 1968); *Alexander* v. *United States,* 362 F. 2d 379 (9th Cir. 1966), *cert. denied,* 385 U. S. 977 (1966).

effectively enforced through spot-checks, and checks based on suspicion, on some of the literally millions of entries of persons and material that occur annually. This function, long deemed esssential, not only requires searches, but searches without warrants. Furthermore, a nation's borders are in a sense its doors, authority over which may readily be distinguished from authority over the persons and property of those who are lawfully within. The Government has a special interest in screening those who enter, just as it does when persons seek to enter government buildings, *Barrett* v. *Kunzig,* Civ. No. 6193, M. D. Tenn., decided Aug. 11, 1971.

Reliance on *Abel* v. *United States,* 362 U. S. 217 (1960), and *Wyman* v. *James,* 400 U. S. 309 (1971), is also misplaced. *Abel* involved a search justified as incident to a lawful arrest, pursuant to a warrant authorizing Abel's detention pending deportation hearings that had been issued by the Immigration and Naturalization Service. The Court ruled (by a 5-4 vote) that the search was limited enough to be reasonable under the Fourth Amendment because "government officers who effect a deportation arrest have a right of incidental search analogous to the search permitted criminal law enforcement officers." 362 U. S. at 237. Other items were seized during a search of Abel's luggage after he was in custody. This search, too, was proper under an established rule—that all of a prisoner's belongings in the immediate place of arrest are subject to search.

Wyman v. *James* involved a case worker's visit to the the home of a welfare recipient, after several days' notice, which was compulsory only in the sense that to refuse to permit the visit would render the recipient ineligible for relief. The Court held that no "search" was involved. Mr. Justice Blackmun also carefully noted for the Court that the issue presented was whether the recipient could be deemed ineligible for refusing to allow such a visit, and not

whether evidence secured from the visit could be used in a criminal trial. 400 U. S. at 324. Alternately, the Court held if the visit was a search, it was a reasonable one because the state had the power to condition bestowing welfare "benefits," to which Mrs. James had no "right," by requiring home visits. Therefore, the only way the Government can rely on *Wyman* in this case is upon the absurd premise that the Fourth Amendment right is a "benefit" that must be surrendered at the whim of the Attorney General.

The exceptions to the warrant requirement are, therefore, inapposite to support the Government argument that the President needs the power to wiretap without a warrant to gather intelligence information. There is indeed a governmental interest in gathering intelligence information to assure the "protection of the fabric of society itself." Gov't Brief, p. 14. But it is not the interest at stake in this case. The Court in *Camara* was confronted with an argument identical in principle to that raised here by the Government —"that the health and safety of entire urban populations is dependent upon enforcement of minimum fire, housing, and sanitation standards, and that the only effective means of enforcing such codes is by routine systematized inspection of all physical structures." As the Court noted, "this argument misses the mark. The question is not . . . whether these inspections may be made, but whether they may be made without a warrant." 387 U. S. at 533.

Camara demonstrates how fallacious is the Government's attempt to prove the need for an exception. The question here is not "whether the public interest [in national security] justifies the type of search in question [electronic eavesdropping to gather intelligence], but whether the authority to search should be evidenced by a warrant. . . ." *Id.* The executive branch has broad authority to gather information to protect society, including the power to search in connection with all crimes, covering every conceivable threat

to national security,[10] and to eavesdrop without warrant in emergencies.[11]

2. The President's responsibilities must be executed through means consistent with Constitutional principles.

The Government states, and we agree, that "the President is responsible for insuring that our system of government functions as a viable entity." Gov't Brief, p. 15. In fact, his duty is even greater, and more challenging. He is sworn, not to protect the government as such, but to "preserve, protect and defend the Constitution of the United States." U. S. Const. Article II, Section 1. He has great powers, among them the authority to gather information pertinent to his duties. But his powers must be exercised, and the need for information satisfied, through constitutionally proper means.

That the Constitution limits the President even in his most awesome responsibilities is well established. *E.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579

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[10] *E.g.*, 18 U. S. C. § 231 (teaching how to use or transporting firearms or explosives to be used in civil disorders; obstructing firemen or police in performing duties incident to a civil disorder); §§ 792-4 (espionage and related crimes); §§ 1361-4 (malicious mischief against government property, communications, etc.); § 1717 (use of mails to advocate treason, insurrection or forcible resistance to any law of the U. S.); §§ 2381-91 (treason; inciting rebellion; advocating overthrow of government; failure of certain organizations to register); §§ 371 & 372 (conspiracy to violate any law; and to impede or injure any officer of the U. S.); § 2 (aid or abet commission of any offense). There are literally dozens of other, pertinent statutes, executive orders and agency regulations. See generally *Government Security and Loyalty: Regulations and Procedure* (BNA 1955, Supp. 1970); INTERNAL SECURITY MANUAL (rev.), Sen. Doc. No. 126, 86th Cong., 2d Sess. (1961).

[11] In the Omnibus Crime Control and Safe Streets Act of 1968, the Attorney General is empowered to apply to a court for an order to wiretap, or in emergencies unilaterally to authorize wiretaps, subject to subsequent judicial approval, in connection with several crimes, including espionage, sabotage, treason and riots. 18 U. S. C. §§ 2516(1)(a) & 2518(7).

(1952); *Kendall* v. *United States ex rel. Stokes*, 37 U. S. (12 Pet.) 524 (1838). As Mr. Justice Davis stated in *Ex Parte Milligan*, 71 U. S. (4 Wall.) 2, 120 (1886), in reference to an exercise of the war power:

> The Constitution . . . is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by . . . man than that any of its provisions can be suspended during any of the great exigencies of government.

The Government stresses that its objective is to safeguard the national security. But the authority it invokes to support its broad claim, *United States* v. *Robel*, 389 U. S. 258, 263-64 (1967), provides eloquent testimony of objectives even more fundamental than national defense:

> [T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.' *Home Bldg. & Loan Association* v. *Blaisdell*, 290 U. S. 398, 426 . . . . Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.

The Fourth Amendment, related as it is to the First and Fifth Amendments, was designed to protect these fundamental liberties despite emergencies. Mr. Chief Justice Hughes cautioned in *Home Bld'g & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398, 442 (1934): "Emergency does not create power. . . . The Constitution was adopted in a period of grave emergency," and "the Constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. . . ." This Court sits to preserve individual rights in the face of arguments based on necessity, in whatever context or by whichever branch of government they are made.[12]

Although the Government cites many cases dealing with foreign affairs,[13] it makes no argument that a foreign threat to our security justified the action in this case. The conditions which, according to the Government, require information-gathering through warrantless wiretaps, are a recent "alarming" increase in acts of sabotage, and the need to know "the plans of those who have committed themselves, in many instances publicly, to engage in covert, terrorist tactics to destroy and subvert the government." Gov't Brief, pp. 18-19. The latter danger is certainly within the President's power to investigate. When the Government can demonstrate that an individual is preparing to commit terror, it surely will be allowed to act in any reasonable manner, including eavesdropping where appropriate. Terrorist acts are outlawed in this society.

The claim that bombing has increased is factually unfounded and legally irrelevant. Nothing referred to by the

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[12] *E.g.*, *New York Times* v. *United States*, 403 U. S. 713 (1971); *Powell* v. *McCormack*, 395 U. S. 486, 549 (1969); and cases cited *supra* at 24-25.

[13] *United States* v. *Curtiss-Wright Export Co.*, 299 U. S. 304 (1936); *Chicago & So. Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103 (1948); *United States* v. *Belmont*, 301 U. S. 324 (1937); *United States* v. *Pink*, 315 U. S. 203 (1942).

Government permits its assertion of an increase in bombing "in the last several years."[14] If the statistics alluded to prove anything,[15] they refute the claim that there were "3,285 bombings" from July 1, 1970 to July 1, 1971, "most of which involved government-related facilities." *Id.* at 18 n.7. The data cited indicate there were far fewer "incidents"

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[14]The data referred to by the Government relate to the period beginning Jan. 1, 1969. No comparison may therefore be made of the incidence of bombing "in the last several years." Why, moreover, would an increase in "bombing" over the last several years be significant? These United States have now prospered almost 200 years. If pertinent, would it not be imperative to show that bombing or other threatening political violence had reached all-time record proportions? Of course, no such showing could be made. After studying the question of violence in America, the National Commission on the Causes and Prevention of Violence concluded that we have "always been a relatively violent nation." To ESTABLISH JUSTICE, To INSURE DOMESTIC TRANQUILLITY 1 (1969). An extensive study prepared for the Commission found that the present period of history is no more politically violent than many other periods. See Kirkham, Levy & Crotty, *Assassination and Political Violence* 189-90 (1969). The literature on violence in America confirms this view. See generally Hofstadter & Wallace, eds., AMERICAN VIOLENCE (1970); Graham & Gurr, VIOLENCE IN AMERICA (1969); Aaron, ed., AMERICA IN CRISIS (1952).

[15]The statistics are of dubious value. None of the publicly available studies on bombing (FBI data is unavailable) reveals its methodology in any detail. The National Bomb Data Center (NBDC) informed counsel that its methodology is confidential, beyond the fact that it relies on the media and on "reporting agencies." All that is known of how the Alcohol, Tobacco and Firearms Div. of IRS collected its data is that they were supplied by local and state law enforcement agencies. Hearings on Riots, Civil and Criminal Disorders, before the Perm. Subcomm. on Investigations, Comm. on Gov't Operations, U. S. Sen., 91st Cong., 2d Sess. 5339 (1970). The Staff Study of the Subcommittee on Investigations "was compiled for the most part, from available public source material, news clips, and also limited contact with major law enforcement agencies." *Id.* at 5757. The figures presented in these studies vary widely, thereby indicating differences in definition, possible bias in collection and reporting, and differing conceptions of what should be reported. The seriousness of these deficiencies is reflected by the literature on crime statistics. See generally Pres. Comm'n on Law Enforcement and Admin. of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY 25-31, 38-43 (1967); 1 Radzinowicz & Wolfgang, eds, CRIME AND JUSTICE 121-29, 130-31, 167-76 (1971); Bell, THE END OF IDEOLOGY 151-74 (1962).

during that period than 3,285[16]; that "incidents" include bombings, attempted bombings, and the use or attempted use of any explosives, including firecrackers[17]; and that only a small proportion of the incidents reported could conceivably be said to involve "government-related facilities" in the sense used in section 2511(3) of the 1968 Act.[18] In fact, the data reveal very few incidents arguably involving activities, seriously threatening to internal security, that eavesdropping could have detected in advance. We stress these facts, not because they are pertinent to the question presented, but because this Government effort to create false fear reflects how baseless are both the claimed need

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[16]We have been unable to ascertain how the Government arrived at its figure of 3,285 "bombings" between July 1, 1970 and July 1, 1971. NBDC figures supplied to counsel in *Summary Report 6-71*, indicate during that period 1,562 "incidents", involving 2,022 bombs, causing 171 injuries and 15 deaths (as compared, for example, to 55,000 deaths per year in automobile accidents). Moreover, these figures include 270 incidents in which no detonation occurred, involving 420 bombs. We are filing with the Court copies of the relevant NBDC report.

[17]Some of the incidents were serious, but the figures reported are rendered meaningless for present purposes by their indiscriminate inclusiveness. For example, one of the "bombings" which occurred on June 13, 1971 is reported as follows: "*St. Paul* A small cherry bomb device, which was placed inside a galvanized trash can, detonated behind a private residence. Damage was said to be negligible. 1A-1J-1A-2-1-50-0Y-0Y." *Id.* at 23. On February 5, 1971, in Anaheim, California, "in what was thought to be a prank, a military flare device was thrown from a car onto an unused section of a shopping center parking lot. No damage resulted in the incident." *Id.* 2-71, p. 15.

[18]Table D of the NBDC *Summary Report 6-71* classifies incidents by "known or suspected" motive. Of 1,562 incidents, no more than 500 could conceivably be said to have involved any level of government. Table F summarizes target locations for June 1971; only 3 of 180 devices were found at military facilities. Even the fact that a device was found at a military facility cannot be taken too seriously. For example, one incident that apparently was counted as such an attack involved recovery of "an incendiary device" at Fort Jackson, So. Carolina, "a short distance from a pond at the military facility." *Id.* at 15. Apparently counted as acts of "protest" were three bombings "protesting the exhibition of nude art at the Memphis Academy of Arts." *Id.*

for warrantless eavesdropping and the repeated assurances that our rights can safely be placed in the unchecked discretion of the nation's chief executive or prosecutor.

3. "Information gathering" through electronic surveillance is far more, not less, threatening to privacy and protected freedoms than conventional searches undertaken to prove specific crimes.

The Government's claim that a new exception be made to the warrant requirement is based in large part on an asserted distinction between "the collection of intelligence information to protect the national security and a search made in connection with a criminal investigation. . . ." Gov't Brief, p. 16. "[T]here may be less need for a warrant," the Government here contends, "where the purpose of the search is not criminal investigation." *Id.* at 19.[19] One cannot distinguish meaningfully between "intelligence" gathering and criminal investigation, and claim at the same time authority to use the fruits of both types of searches in criminal trials. A decision to authorize the use of "intelligence" as evidence is, in any meaningful sense, a decision to allow warrantless electronic searches to gather usable evidence.

Assuming, however, that such a distinction could be made, it does not follow that there is less need for a warrant when "intelligence" is gathered than when evidence is collected. It may be that some forms of warrantless information gathering are less offensive than warrantless criminal investigation. See, *e.g., Wyman* v. *James, supra.* But other forms of warrantless information gathering may be far more offensive, even where the information gathered is

[19]In the Circuit Court the Government's claim was that warrantless eavesdropping would be used "primarily" to gather "intelligence," and "will rarely if ever, be authorized for the sole purpose of gathering evidence for subsequent criminal prosecutions." Gov't Memorandum, filed Feb. 8, 1971, p. 33.

never used to prove a crime. The offensiveness of a search under the Fourth Amendment cannot safely depend on whether the Government claims its purpose (or "primary" purpose) was informational or evidentiary. It depends, rather, on the nature of the search as judged by the historic purposes of the warrant requirement: to limit the scope of searches; to assure that searches are adequately justified by some evidence before being implemented; to obtain a neutral and detached review of the propriety of a proposed search; and to protect fundamental interests expressed in the First and Fifth Amendments. See *Ker* v. *California*, 374 U. S. 23, 33 (1963). By these standards, the warrant procedure is if anything more essential in connection with electronic "intelligence" gathering than in traditional criminal investigation.

a. Electronic "information gathering" is more indiscriminate in scope than searches to prove specific crimes.

The Attorney General's order to search in this case is in every sense a general warrant. It almost totally lacks particularity. It authorizes essentially unlimited eavesdropping of the subjects chosen. We do not know against whom the search was directed. But the authority claimed would certainly allow orders to wiretap groups of unidentified persons. Because of the nature of eavesdropping, moreover, any and all persons having contact with the tapped telephones were also heard.[20] Furthermore, *all* conversations were intruded upon and, in effect, seized, including those having nothing even remotely to do with national security. And no limit was set on either the times during which eavesdropping could be undertaken, or the duration of any

[20] In terms of the interest in particularity it is more, not less, offensive that a complainant's phone was not tapped. That conversations of persons calling a tapped phone are monitored reflects how indiscriminate is the search involved.

wiretaps. The latter point is strikingly illustrated by the fact, revealed in the Government's brief, p. 30 n.13, that the tap involved in this case lasted *at least fourteen continuous months,* presumably day and night, and indiscriminately intruded upon 952 outgoing calls that were either placed to overseas installations or which dealt with "foreign subject matter," and possibly many more incoming calls and calls that dealt with domestic matters. The general warrants of the 1760's pale into insignificance before the indiscriminate scope of such an electronic search. See *Olmstead* v. *United States,* 277 U. S. 438, 473 (1928) (dissenting opinion of Brandeis, J.).

In *Berger* v. *New York,* 388 U. S. 41, 45-47 (1967), this Court described extensively the dangers of electronic surveillance, including the breadth of scope made possible by modern technology. "The need for particularity and evidence of reliability . . . is especially great in the case of eavesdropping," the Court stated, because "[b]y its very nature eavesdropping involves an intrusion on privacy that is broad in scope." *Id.* at 56.[21] The search invalidated there was far less offensive by the criteria of particularity than the present search, since the statute involved in *Berger* at least required that the persons to be surveilled be named, and that application for authority be renewed after a maximum of two months. Here, no limits existed.

b. *Electronic "information gathering" is implemented without adequate justification.*

The electronic search ordered in this case, in common with the general warrants outlawed by the Fourth Amendment, permits invasions of homes and any other places

[21] "Electronic aids add a wholly new dimension to eavesdropping. They make it more penetrating, more indiscriminate, more truly obnoxious to a free society." *Lopez* v. *United States,* 373 U. S. 427, 466 (1963) (dissenting opinion of Brennan, J.).

containing telephones, without any predetermination that the intrusion is supported by probable cause. The standard under which the Attorney General claims to have acted gives him the power to order surveillance whenever he "deems" it necessary for national security, a power precisely analogous to that of the British Secretary of State in 1763. We do not know how much proof, of what acts or plans, the Attorney General possessed before ordering the tap in this case. Nor is it relevant in resolving the question before us, since the authority he seeks would permit him to proceed without any predetermination of probable cause. But it is extremely significant that the Government claims to have proceeded here to gather "intelligence information," rather than to prove any crime; that the Government specifically contends that its search should be judged under an "arbitrary and capricious" standard, applied after the fact, rather than "probable cause"; and that the standard must be applied in an inquiry that focuses on the reasonableness of the search's subject matter, rather than on the evidence supporting a particular search (which must often be kept secret).

That a search has no specific crime as its object makes it even more offensive than searches pursuant to general warrants and writs of assistance, which were at least aimed at specific crimes (seditious libel and illegal importation of merchandise). It means that the Attorney General may order a search on the basis of evidence of non-criminal conduct that he labels "threatening to the national security." That the "probable cause" standard, judicially honored for more than 200 years, should be dispensed with in favor of a vague "arbitrary and capricious" standard means that the evidence, if any, of the threatening non-criminal conduct involved need not be as strong as the evidence of criminal conduct normally required for a valid search. And the claim that judicial inquiry must not come to grips with

the evidence in support of particular searches means that the lesser quantum of evidence of threatening non-criminal conduct supporting the search need not even relate to the particular individuals whose privacy is breached. It is enough, says the Attorney General, if the evidence shows that "the subject of surveillance bore" a "reasonable relation to national security. . . ." Gov't Brief, p. 35. This sort of predetermination cannot protect the innocent from general warrants.

The Government argues that the protection derived from the showing of proof normally required before searches are allowed is dispensable, since it is collecting "information" which "normally" will not result in prosecutions. See Gov't Brief, p. 21. Under this view, the Fourth Amendment would protect only those prosecuted. The framers intended no such result. The warrant requirement was adopted "to protect the innocent," *United States* v. *Rabinowitz, supra* at 82 (dissenting opinion of Frankfurter, J.), by subjecting whatever proof the Government may have of a crime to the test of "probable cause" before an entry occurs.[22] To dispense with the requirement that evidence of a crime be demonstrated before eavesdropping occurs is to invite searches more, not less, offensive. "The purpose of the probable-cause requirement of the Fourth Amendment, to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed, is thereby wholly aborted." *Berger* v. *New York, supra* at 59. See also *Id.* at 54-55.

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[22]The Court rejected a similar contention in *Camara, supra* at 530-31:

> It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, while the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security.

c. *Electronic "information gathering" is implemented on executive order, without judicial supervision*

The present search is also deficient because it was implemented without neutral and detached judicial review of its scope or justification. The Government's claim that the judiciary is unsuited to decide matters pertaining to "national security," is an impossible position to maintain. Federal courts frequently rule on such matters, see, *e.g.*, *Cole* v. *Young*, 351 U. S. 536 (1956); *New York Times* v. *United States, supra; United States* v. *Robel, supra,* and the Government concedes a judicial role in reviewing the legality of such searches after the fact. The very cases for which the framers set up an independent judiciary to protect our personal liberties were those in which the executive or Congress might claim, as counsel for the government messengers did in *Entick* v. *Carrington, supra,*[23] that the national security required us to forego our rights.

The need for judicial intervention before the fact is a protection distinct from the substantive rules that determine reasonableness. Even assuming, for example, that national security requirements justify searches of broader scope than usual, and on the basis of evidence sufficient only to prove that the Attorney General's judgment was not arbitrary and capricious, the warrant requirement would insist that the applicable standards be applied by a neutral magistrate before the fact. This requirement reflects the Constitution's commitment to a government in which no branch is supreme, especially when provisions of the Bill of Rights are at stake. "Under the separation of powers created by

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[23] "Supposing the practice of granting warrants to search for libels against the state be admitted to be an evil in particular cases, yet to let such libellers escape, who endeavor to raise rebellion, is a greater evil. . . ." XIX How. St. Tr. at 1040. The court responded: "With respect to the argument of state necessity, or distinction that has been aimed at between state offenses and other, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions." *Id.* at 1073.

the Constitution, the Executive Branch is not supposed to be neutral and disinterested." *Katz* v. *United States, supra* at 359 (concurring opinion of Douglas, J.). See *Coolidge* v. *New Hampshire, supra* at 474.[24] Indeed, if the rules relating to the scope of, and basis for, electronic searches are to be varied in national security cases, as the Government argues they should, judicial intervention before the fact becomes even more crucial to prevent abuse of power.

d. *Electronic "information gathering" raises substantial questions under the First and Fifth Amendments.*

The power claimed in this case raises substantial constitutional questions under provisions other than the Fourth Amendment. "Few could gainsay the vital role of the protections of the Fourth Amendment in a free society, especially as they may guard against invasions of privacy of those suspected of unorthodoxy in matters of political belief and conscience." Landynski, *supra* at 264-65. "Historically, the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power," *Marcus* v. *Search Warrant*, 367 U. S. 717, 724 (1961), a history that was "fresh in the memories of those who achieved our independence and established our form of government," *Boyd* v. *United States, supra* at 625-26.[25] And this Court has held that the

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[24]The court held in Entick that the Secretary of State—"the great executive hand of criminal justice," XIX How. St. Tr. at 1064—was not a magistrate authorized to issue common law warrants. *id.* at 1045-59.

[25]General warrants had been widely used to enforce "oppressive laws concerning printing, religion, and seditious libel and treason . . .," to detect and punish "non-conformism," to censor, to suppress Puritan dissent, and to search and regulate the press. Lasson, *supra* at 24-33. In *Entick*, counsel called upon the court to "demolish this monster of oppression, and to tear into rags this remnant of Star-chamber tyranny," XIX How. St. Tr. at 1039, and Lord Camden described and refused to follow the Star-chamber practice, *id.* at 1069-70.

warrant requirement must be applied with particular care, to require discriminate, well-supported searches, when First Amendment interests are at stake. *Stanford* v. *Texas*, 379 U. S. 476, 485 (1965).

The First Amendment prohibits not only prior restraints, "but any action of the government by means of which it might prevent . . . free and general discussion of public matters . . .," *Grosjean* v. *American Press Co.*, 297 U. S. 233, 249-50 (1936) (see *Near* v. *Minnesota*, 283 U. S. 697, 715 (1931)), including inhibition as well as prohibition, *Lamont* v. *Postmaster General*, 381 U. S. 301, 307 (1965). It protects free expression not only "against heavy handed frontal attacks, but also from being stifled by more subtle governmental interference." *Bates* v. *City of Little Rock*, 361 U. S. 516, 524 (1960). Futhermore, it protects against all lawmaking activities, including investigation, *DeGregory* v. *Attorney General*, 383 U. S. 825, 829 (1966), even when the investigation is for law enforcement as opposed to statute-writing purposes, *Gibson* v. *Florida Legislative Investigation Comm'n*, 372 U. S. 539, 561-62 (1963) (concurring opinion of Douglas, J.).

Investigation in the form of electronic "intelligence gathering" can undoubtedly have a "chilling effect" on groups and individuals engaged in or contemplating protected political activity. See *NAACP* v. *Button*, 371 U. S. 415 (1963); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). The only remedy against overbroad use of electronic surveillance "is to keep one's mouth shut on all occasions." *Lopez* v. *United States*, *supra* at 450 (dissenting opinion of Brennan, J.).

The standard under which the Government claims to have acted in this case is found in section 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968, which provides that nothing in the Act was intended to limit the "constitutional power of the President to take

such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government." 18 U. S. C. § 2511 (3). We reject the contention that section 2511 (3) provides authority for eavesdropping. See *infra* at 59-61. If the section does provide a standard, however, it it an extraordinarily broad one. By appearing to authorize the President to take all measures "he deems necessary," without judicial supervision, it makes valueless any limits arguably imposed by the subsequent language. Even assuming that the measures he invokes must be reasonable in light of the purposes outlined in the statute, those purposes are themselves overbroad. Overthrow of the Government "by force" is familiar, but the phrase "or other unlawful means" is unclear, and could be construed to include forms of peaceful protests, deemed illegal by the Attorney General under standards that might not pass judicial muster.[26] Similarly, while the phrase "clear and present danger" has frequently been used, *e.g., Dennis* v. *United States,* 341 U. S. 494 (1951), protecting the "structure or existence of the Government" could allow eavesdropping, not only for dangers to the entire government but to its parts or even to its present form.

The potential breadth of the provision is reflected, for example, by the Memorandum filed by the Government in opposition to defendants' motion to suppress in this case. The Government claimed that warrantless surveillance is necessary to obtain intelligence information about groups "which are committed to the use of illegal methods to bring about changes in our form of Government and which may

[26] A peaceful demonstration is protected, regardless of the purposes of its organizers, if it conforms to reasonable government regulation. *Edward* v. *South Carolina,* 372 U. S. 229 (1963); *Hague* v. *CIO,* 307 U. S. 496, 515-16 (1939).

be seeking to foment violent disorders." Gov't Memorandum, filed Dec. 10, 1970, p. 8. Apparently, the "illegal methods" need not be violent, and the efforts involved need not be aimed at the "overthrow" of the government, but only at a "change" in its "form," conceivably to one more, not less, democratic or republican. And the change in form may itself be constitutionally permissible, as are changes brought about through legislation or amendment; it is enough that, in the Attorney General's judgment, illegal methods of some sort *may* be employed toward that end.

The phrase "may be seeking to foment violent disorders" raises at least two serious objections. A person or group may constitutionally argue, for example, through speech alone, that violence may be necessary to change the Government's policies. Such advocacy may be prohibited only where it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio,* 395 U. S. 444, 447 (1969). But the Government's standard would allow eavesdropping even though action was neither likely nor imminent. Second, and more important, is the danger implicit in the Government's use of the word "may." It emphasizes the fact that the alleged delegation of power to eavesdrop contains no requirement that any proof exist that the persons or groups involved are actually seeking to overthrow the Government by force, or are actually engaged in "fomenting" violent disorders. The Government is free to proceed under the formula when it concludes that it is *possible* that groups or individuals may be engaged in activities covered by the delegation. Not even "probable cause" to believe that the suspects were engaged in the activities covered would be required under the Government's proposed "arbitrary and capricious" test.

The standard said to govern electronic "intelligence gathering" also violates the First Amendment principle

that requires the Government to regulate in areas of protected activity through the most discriminating means available for the task. The Government may not pursue even a "legitimate and substantial end" by means "that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, *supra at* 438. The standard in section 2511(3) could be construed to allow surveillance of persons and groups concerning whom the Government has no evidence of illegal advocacy or action. For example, because a group may advocate matters which, in the Attorney General's judgment, bring it within the scope of the statute's language, he is arguably free under the Act to authorize eavesdropping on all the group's members.

Indeed, the statute would allow the Attorney General to eavesdrop on a group's entire membership, when only one of its members advocates improper action, where the Attorney General concludes that the individual *may* be stating a group policy. The so-called standard would allow the Government to use any means for its investigations, and in practice this has meant electronic surveillance, an extraordinarily indiscriminate means for obtaining information. Analogous First Amendment cases have prohibited such indiscriminate government regulation, even where the governmental purpose was to protect the national security. *E.g.*, *United States* v. *Robel*, *supra* at 264-66; *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Aptheker v. Secretary of State*, 378 U. S. 500, 512-13 (1964); *Shelton* v. *Tucker*, *supra*; *Scales* v. *United States*, 367 U. S. 203 (1961).

The power to gather statements of persons without their consent, through an indiscriminate means, and without probable cause, also raises substantial questions under the Fifth Amendment where the Government later seeks to

use the statements gathered as evidence. The relationship of the Fourth and Fifth Amendments stems from *Entick* v. *Carrington* itself. See *Lopez* v. *United States, supra* at 454-57 (dissenting opinion). Statements obtained from a suspect against his will, through a lawful warrant for eavesdropping, may be used as evidence against him. The Fourth and Fifth Amendments, read together, authorize as reasonable a search and seizure even for oral evidence when made pursuant to a proper warrant. Therefore, nothing would be left of the privilege against self incrimination if, in any situation deemed to involve "national security" as broadly encompassed in section 2511(3), oral evidence could be seized without required warnings, through a warrantless electronic search, indiscriminate in scope, and implemented without probable cause. To say that the search in this case is valid is to allow the seizure of a suspect's words in circumstances that obviate the requirement that he consent before being a witness against himself. It is to substitute electronic devices for the rack of the Star-chamber as a way of compelling testimony on mere suspicion—less physically painful, but no less destructive of the values the Bill of Rights sought to preserve.

e. After-the-fact judicial review under an "arbitrary and capricious" standard is constitutionally inadequate.

The Government contends that the Attorney General's decisions to eavesdrop will be adequately checked by judicial supervision after, rather than before, surveillance is completed. It concedes, however, that the judicial supervision it contemplates must be "extremely limited" in scope. In the Government's view, an electronic search for intelligence information must not be judged, even after the fact, by whether "probable cause" existed for the Attorney General's belief that his authority under the "standard" of the

Omnibus Crime Control and Safe Streets Act should have been exercised. Rather, the appropriate test is claimed to be the "arbitrary and capricious" standard, previously reserved for commonplace discretionary actions of government agencies. And, since most of the information necessary to apply even this watered-down test would not be made available to the court because it is "confidential," a court would rarely, if ever, be able to make an informed judgment on the need for a "particular" search. "The court should not substitute its judgment for that of the Attorney General." Gov't Brief, p. 22. Indeed, the Government contends that it would be inappropriate to review the need for a particular surveillance, *id.* at 23; the sole test should be whether "the subject of surveillance bore no reasonable relation to national security." *Id.* at 35.

This proposed scheme for judicial participation is patently deficient. Even if a convincing case could be made for making an exception to the warrant requirement for "national security" investigations, the proper standards for review after the fact must be substantially the same as those applied before the fact. A warrantless search allegedly falling within an exception must be reviewed, first, to determine whether the exception properly applies. For example, a search incident to an arrest is lawful only if the arrest itself was valid; probable cause must be demonstrated in each case to justify the initial intrusion on the suspect's privacy. Further, the scope of a warrantless search is limited in accordance with the purpose for which it was allowed. In *Chimel* v. *California, supra* at 763, this Court held that a search incident to an arrest can extend only to the "arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence." See also *Coolidge* v. *New Hampshire, supra* at 455-73, and authorities cited therein.

The Government would dispense with the probable cause test—thereby raising serious constitutional questions, see, *e.g., Berger* v. *New York, supra* at 59; *Camara* v. *Municipal Court, supra* at 535— and would legalize intrusions wherever the subject bears a "reasonable relation to national security." And the Government position apparently would allow no supervision of the scope of national security searches. Only reviewing the particulars of a search will reveal whether the Government went too far; but under the Government's "standard," the courts would be denied access to the particulars.

Even an after-the-fact review that met all the traditional Fourth Amendment requirements could not substitute for review in a warrant proceeding. "[A]fter-the-fact justification for the . . . search [is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck* v. *Ohio,* 379 U. S. 89, 96 (1964). Second, after-the-fact review can only seek to deter *future* unreasonable searches by excluding evidence or awarding other relief to the aggrieved party. But "[t]he real evil aimed at by the Fourth Amendment is the search itself . . ." *United States* v. *Potter,* 43 F. 2d 911, 914 (2d Cir. 1930) (L. Hand, J.). Only before-the-fact review can prevent unreasonable searches from occurring.

Moreover, after-the-fact review of national security electronic surveillance would generally be available only to individuals who are being prosecuted, when they move to suppress. As the Government states, however, "most national security electronic surveillances do not result in prosecutions." Gov't Brief, p. 21. Most persons surveilled would therefore be denied any remedy for illegal intrusions, since the fact that such a search has occurred will be kept secret. The subjects of warrantless conventional searches, or of electronic searches conducted under the Omnibus Crime Control and Safe Streets Act of 1968, would generally receive notice of such searches, thereby enabling them to

seek judicial relief even when they are not prosecuted. See Fed. R. Crim. Proc. 32; 18 U. S. C. § 2518(8)(d). But the subjects of warrantless "national security" surveillance who are never prosecuted would never know their privacy had been illegally invaded. They can be protected from illegal intrusions only through a warrant proceeding.

Ultimately the Government's position rests on its cavalier observation that "any power a government official possesses is subject to abuse, and that possibility is not a valid reason to deny him the power." Gov't Brief, p. 35. It is disturbing that the Attorney General's "power" here referred to is discussed in the Government's brief as if it were a common place administrative discretion rather than the awesome power to intrude in to the lives of individual citizens without any meaningful judicial supervision. "[P]ower, once granted, does not disappear like a magic gift when it is wrongfully used." *Bivens* v. *Six Unknown Named Agents,* 403 U. S. 388, 392 (1971). It persists. And it becomes available, for misuse and further exploitation, to each new administration, in each new national crisis. The possibility of abuse of the privacy of homes and communications is precisely why the warrant requirement was established. The Bill of Rights is a national commitment to avoid such possibilities.

4. Resort to the warrant procedure would not frustrate the legitimate purposes of domestic "national security" searches.

At the heart of the Government's effort to prove its need for warrantless "national security" eavesdropping is its attempt to invoke the rule enunciated in *Camara, supra,* at 533. Gov't Brief, pp. 23-24. Not only does the Govern-

ment distort the language of *Camara*[27]; it misinterprets the rule. The frustration in purpose that Mr. Justice White, writing for the Court, had in mind appears in the sentence immediately following the language quoted in the Government's brief: "It has nowhere been urged that fire, health, and housing code inspection programs *could not achieve their goals* within the confines of a reasonable search warrant requirement. Thus, we do not find the public need argument dispositive." (Emphasis added.)

But the "frustration" to which the Government refers in its brief is of an entirely different character; it relates to no more than the burden or risks that it conceives to be involved in disclosing to "a magistrate of all or even a significant portion of the information and policy, considerations the Attorney General weighed in reaching his decision" to engage in electronic surveillance which would "create serious potential dangers to the national security and to the lives of informants and agents," Gov't Brief, p. 24. That might make effective surveillance impossible, the Government argues, and "frequently" would compel the Attorney General to choose between disclosure and "foregoing the use of a proven effective method of gathering intelligence information . . ., *id.* at 26. It asserts, moreover, that requiring a warrant "would compel the judiciary to embark upon a far different kind of inquiry than courts now make in considering an application for a warrant," one which is beyond their "experience or facilities." *Id.* at 25-26.

[27]In quoting from *Camara*, the Government omitted the italicized language in the following: "*In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but* whether the authority to search should be evidenced by a warrant, *which in turn* depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." The omission obscures the fact that the Government must make a case for an exception to an important Constitutional principle.

The claim that disclosure of "highly confidential" information to the federal courts in warrant proceedings would endanger the national security and the lives of informants is totally unsupported. We are not told of a single instance in which any federal judge or magistrate abused his authority by revealing to unauthorized persons information communicated *ex parte* for the purpose of passing upon the legality of a contemplated search. The danger of leaks by clerks, stenographers and other assistants can readily be avoided. As the Court of Appeals noted, "If there be a need for increased security in the presentation of certain applications for search warrant in the federal court, these are administrative problems amenable to solution." 444 F. 2d at 666. In particularly delicate situations the Attorney General might seek his warrant from the Chief Judge of the appropriate United States Court of Appeals or from his designee. See 18 U. S. C. § 2510 (Supp. V., 1965-69).

The Government's argument suggests that all information relevant to probable cause must be disclosed in a warrant proceeding. This is incorrect. A warrant proceeding allows wide flexibility in the type of information that may be presented or withheld. Strict evidentiary rules are inapplicable. *Brinegar* v. *United States, supra* at 176. The Government may rely on information received through an informant, see *Draper* v. *United States,* 358 U. S. 307 (1959), even to the point that a warrant may issue solely upon hearsay, *Jones* v. *United States,* 362 U. S. 257, 271 (1960). And, significantly for present purposes, the informer's identity need not be revealed, either before the search or subsequently on a motion to suppress. *McCray* v. *Illinois,* 386 U. S. 300 (1967). Courts would, if anything, be even more sensitive to the need for secrecy of sources in "national security" cases than in ordinary criminal prosecutions. Therefore, whatever may be the merits of the Government's claim that eavesdropping is a "proven effec-

tive method of gathering intelligence information,"[27] the dangers posed by requiring a warrant before evidentiary use is permitted are modest at most, and may readily be obviated. And when a warrant is obtained the government may invoke the rule of *United States* v. *Ventresca,* 380 U. S. 102 (1965), giving it the benefit of any doubt concerning the search's legality.

The courts have traditionally issued warrants in cases involving the "national security" and, despite the Government's doubts, the task is "within the reach of experienced trial judges." *Nardone* v. *United States,* 308 U. S. 338, 341 (1939). As we have seen, in implementing the warrant requirement the judiciary seeks to limit the scope of the intrusion contemplated, to assure that an intrusion is sufficiently justified, and to perform its constitutionally mandated role of protecting the exercise of fundamental freedoms from arbitrary executive power. Whether a proposed eavesdrop is too broad in scope, or lacks adequate justification, or threatens fundamental freedoms are similar inquiries irrespective of whether the subject matter involves an ordinary crime or conduct deemed highly threatening to the nation's safety.

We are not told the basis for the Government's obscure assertion that "in the usual law enforcement situation" an officer seeking a warrant is able to rely upon "a small number of simple facts" to prove probable cause, whereas in "national security surveillance cases" the justification generally "involves a large number of detailed and compli-

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[27] That eavesdropping may be an effective means of gathering intelligence is not at issue. Neither, for the matter, is it pertinent whether eavesdropping may be an effective means of proving crimes, though there is substantial evidence to indicate its ineffectiveness in this regard, see *Berger* v. *New York, supra* at 60-62, as well as its high cost, see Admin. Office U. S. Courts, *Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications* 17 (April 1971) (average cost of each federal court-approved wiretap during 1970 was $12,106).

cated facts whose interrelation may not be obvious to one who does not have extensive background information, and the drawing of subtle inferences." Gov't Brief, p. 25. The gravest threats to national security may be simple situations. On the other hand, conventional criminal cases (organized crime, bankruptcy and security fraud, etc.) frequently require the courts to consider a "large number" of "detailed and complicated facts," which are subtly interrelated. Counsel's job, in such cases, is to explain why the facts establish a sufficient basis for an intrusion, and how broad an intrusion is required. A federal court's constitutional duty is to pass on such arguments and thereby to protect the innocent from improper intrusions. The judiciary's experience and facilities are peculiarly suited to understanding complex factual issues, and to drawing subtle inferences. And common sense suggests that a neutral review is particularly necessary when the Attorney General seeks to eavesdrop on facts and inferences so subtle and complicated that even our most able law enforcement officers would find difficulty in explaining how they justify the search.

The Government's views concerning both the danger and inappropriateness of before-the-fact judicial supervision vary markedly from Congress' assumptions, as reflected in the Omnibus Crime Control and Safe Streets Act of 1968. The Act unambiguously reflects Congressional confidence in the appropriateness of judicial review of electronic surveillance. It contains detailed procedures for pre-surveillance judicial supervision of all interceptions, conferring upon courts even more responsibility in some respects than the Constitution requires in connection with searches by conventional means. See *infra* at 58-59. It specifically requires such review in connection with crimes such as espionage, sabotage, treason and Presidential assassination, 18 U. S. C. § 2516(1)(a)(c), just the sort of cases in which the Government claims disclosure would

gravely threaten national security. It calls for allegations of facts upon which the intrusion is claimed to be justified, 18 U. S. C. § 2518(1), and leaves to the court's discretion whether the information seized should be made available to an aggrieved person upon his filing a motion to suppress, 18 U. S. C. § 2518(10)(a). The judge is trusted with the facts upon which the search is based, as well as with a significant degree of control over the evidence seized. That Congress' judgment on the appropriateness of judicial supervision has proved sound seems most eloquently demonstrated by the Government's frequent use of the 1968 Act. Court approved wiretaps increased from 271 in 1969 to 583 in 1970; applications to federal judges increased during the same period from 34 to 183. In this two-year period, only one application to a federal judge was denied.[28]

It would obviously be desirable for the Attorney General personally to authorize each national security surveillance. Requiring judicial review does not prevent the Attorney General from adopting, and adhering to,[29] a policy of personally authorizing each surveillance. Judges would simply review his hopefully consistent judgments to prevent errors, be they aberrant or persistent. Congress

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[28]See Admin. Office U. S. Courts, *Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications* 5 (April 1971), and *id.* at 4 (April 1970).

[29]The Government states that "the Attorney General personally authorizes each national security surveillance. . . ," and attributes to this an alleged "significant" decline in the number of such surveillances authorized during the last 10 years. Gov't Brief, p. 27 n.10. The Government's practice has, however, varied, and officers other than the Attorney General have authorized warrantless wiretaps. See *infra at* 56. *Alderman* v. *United States*, 394 U. S. 165, 170 n.3 (1969). Nothing would prevent a reversion to prior practice, or for that matter, the delegation of authority, for example, to United States Attorneys. Just as the President can delegate his tasks to subordinate officials, "the Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." 28 U. S. C. § 510.

sought to increase uniformity and accountability in the Omnibus Crime Control and Safe Streets Act of 1968 by requiring the Attorney General or an Assistant Attorney General to authorize all applications for eavesdrops. 18 U. S. C. § 2516(1). Immediately after so providing, however, the Act requires that the applications be made to federal judges, a requirement recognized in the Senate Report as being "in accord with the practical and constitutional demand that a neutral and detached authority be interposed between the law enforcement officers and the citizen (*Berger* v. *New York* . . .; *Katz* v. *United States* . . .). Judicial review of the decision to intercept wire or oral communications will not only tend to insure that the decision is proper, but it will also tend to assure the community that the decision is fair." S. Rep. No. 1097, 90th Cong., 2d Sess. 97 (1968). Foreknowledge that an intrusion will have to be justified to a federal judge will facilitate due consideration by the Government of the reasons for, and evidence supporting, a prospective search. Under the practice suggested by the Government, there need be no such careful scrutiny. As the Circuit Court observed: "this record is devoid of any showing that any presentation of information under oath was ever made before, or any probable cause findings were ever entered by any administrative official—let alone any judge." 444 F. 2d at 667.

Legislative oversight, relied on in Great Britain, is also desirable, but once again also consistent with judicial supervision. To the extent practicable, the President and the Attorney General should be accountable for their eavesdropping policies to the legislature. But meaningful Congressional scrutiny of the grounds upon which national security eavesdropping is authorized would be impossible, if the Government has correctly judged the dangers involved in disclosing such information. Congressmen are no more trustworthy with secrets than federal judges, and the

possibility of leaks would undoubtedly be greater in the deliberations of our most public branch of government, than from *ex parte* motions in judicial chambers.

Legislative and judicial review of eavesdropping practices serve entirely different purposes. The legislature is concerned with general policies and practices, and hence acts intermittently, on the basis of generalized representations. Also it is answerable directly to the people, and therefore likely to respond to the majority will.[30] The federal courts are mandated to protect the rights of individuals, and must act in every case to assure that no policy or practice, no matter how popular, causes an intrusion that violates Constitutional rights.

That Great Britain requires no similar judicial role reflects its system of legislative supremacy. The present British practice, which allows wiretaps without judicial warrant in national security cases, for serious crimes and for customs violations,[31] is precisely the sort of development the

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[30]In its Petition for Certiorari the Government contended that no warrant procedure is necessary to check executive abuse, in part because the Attorney General is accountable to the President, and through him to the people, for authorizing surveillances. This claimed protection is meaningless, since the Government clearly intends to keep secret the extent, scope and subjects of such intrusions. To the extent public approval is relevant, moreover, it is an entirely inappropriate standard by which to define constitutional rights. In times of great internal stress the majority may well favor curtailing the exercise of rights. See, *e.g.*, the poll reported in *Time*, April 27, 1970, p. 19, in which 76% of the respondents answered "no" to the question "as long as there appears to be no clear danger of violence, do you think any group, no matter how extreme, should be allowed to organize protests against the Government?" As Mr. Justice Harlan has noted, "the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will . . ." *Bivens* v. *Six Unknown Named Agents*, *supra* at 407 (concurring opinion). Apparently, the Government has abandoned this argument.

[31]Report of the Committee of Privy Councillors Appointed to Inquire into the Interception of Communications, paras 58-66 (1957). Until recently, it was also routine to tap the telephones of members of Parliament on order of the executive. PARLIAMENTARY DEBATES, Vol. 736, 634-41. The practice of tapping members' telephones was discontinued during the Wilson Government.

framers of our Constitution sought to avoid by adopting the Bill of Rights and forming an independent judiciary to assure its preservation. In short, the British Executive Branch does numerous things that our Executive Branch cannot do because of the Fourth Amendment. Britain's is a national government of inherent powers. Ours is not. Britain's courts are not the ultimate protectors of individual liberties secured under a written Constitution.[32] Ours are.

5. No practice of warrantless electronic surveillance ever existed that could support the Government's claim that the fruits of such searches can be used as evidence in criminal cases.

The Government asserts that "Presidentially-authorized surveillance in national security cases involving threats to overthrow or subvert the government by unlawful means has been undertaken by successive Presidents over a period of thirty years." Gov't Brief, pp. 16-17. And it argues that the exercise of this power supports its existence. *Id.* at 18.

The fact is that there has been no uniform authority since 1940 to use warrantless surveillance in connection with domestic activities. Also, prior usage cannot validate clearly unconstitutional activity; indeed, the practices during the last 30 years included surveillance for purposes that the Government seems now to concede are unlawful. The only practice that is relevant in this case is that which has been

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[32]In Britain wiretapping raises no constitutional questions at all. "[O]nly in the United States can [wiretapping] raise a constitutional issue as such." Wade & Phillips, CONSTITUTIONAL LAW 581 (8th ed. 1970). Neither does opening personal mail, a fact upon which the Privy Councillors relied in approving of wiretapping. Report of the Privy Councillors, *supra* n.31, para. 14(b). In this country, personal mail is protected from government intrusion both by statute, 18 U. S. C. § 1703, and by the Fourth Amendment, *Lustiger* v. *United States*, 386 F. 2d 132 (9th Cir. 1967), *cert. denied*, 390 U. S. 951 (1968).

followed with respect to the use of information obtained through warrantless wiretaps as evidence in criminal trials. And the single uniform element in executive eavesdropping practices since the 1937 and 1939 decisions in *Nardone* v. *United States* has been the premise that the fruits of warrantless eavesdropping may not be "divulged" through such use.

The first President to authorize wiretapping was Franklin Roosevelt. He did so in 1940, after this Court had decided that evidence secured by government wiretaps was inadmissible in criminal cases in view of the provisions of the Communications Act of 1934, *Nardone* v. *United States*, 302 U. S. 379, and that this exclusionary rule extended to evidence based upon information gained or derived from intercepted messages, *Nardone* v. *United States*, 308 U. S. 338. A world war was under way, causing great concern in the Executive Branch and Congress that wiretapping was outlawed even in connection with wartime activities of foreign powers.[33] President Roosevelt's directive of May 21, 1940, stemmed directly from this concern. He stated his agreement with the Court's decision to apply to federal officers the wiretapping prohibition of the 1934 Act. He accepted, without qualification, the aspect of *Nardone* relating "to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases"; and he accepted the judgment, "under ordinary and normal circumstances," that "wiretapping by Government agents should not be carried out for the excellent reason that it is almost bound to lead to abuse of civil rights." Transcript of Record, p. 69.

Roosevelt refused, however, to accept "any dictum" in *Nardone* as applying "to grave matters involving the defense of the nation." Other nations, he wrote, had formed

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[33] See generally Theoharis & Meyer, *The "National Security" Justification for Electronic Eavesdropping: An Elusive Exception*, 14 Wayne L. Rev. 749, 757-60 (1968).

"fifth columns" that were preparing for, and were engaged in, sabotage. With this danger in mind, he authorized Attorney General Jackson to order the interception of the communications "of persons suspected of subversive activities against the Government of the United States, including suspected spies." He added, significantly, that these investigations should be held "to a minimum," and limited "insofar as possible to aliens." *Id.*

The directive secured by Attorney General Clark from President Truman in 1946 was far broader than the one issued by President Roosevelt. In quoting from the Roosevelt order, Attorney General Clark omitted the sentence ordering that eavesdropping be held to a minimum, and limited insofar as possible to aliens. Citing "the present troubled period in international affairs," and "an increase in subversive activities here at home," the Attorney General found it necessary to take the investigative measures referred to in the Roosevelt directive. In addition, he noted, "the country is threatened by a very substantial increase in crime," and stated that, while reluctant to suggest and use these measures "in domestic cases, it seems imperative to use them in cases vitally affecting the domestic security, or where human life is in jeopardy." *Id.* at 70-71.[34]

Apparently, Attorneys General McGrath, McGranery and Brownell followed a policy similar, in principle at least, to that authorized by President Truman.[35] It was conceded in 1966, however, that under Presidents Kennedy

[34]Attorney General Clark, now Mr. Justice Clark (retired), in commenting on the Omnibus Crime Control and Safe Streets Act of 1968, after questioning the constitutionality of the "emergency" provisions of the Act, concluded that while electronic devices should be used "for law enforcement . . . [they] must be narrowly circumscribed and strictly construed. No invasion without prior [court] authorization should be permitted, save in the most exigent circumstances, none of which I can now envisage." Clark, *Wiretapping and the Constitution*, 5 Calif. West. L. Rev. 1, 6 (1968).

[35]Brownell, *Public Security and Wire Tapping*, 39 Cornell L. Q. 195, 199-200 (1954).

and Johnson the FBI was authorized to wiretap "when required in the interest of internal security or national safety including organized crime, kidnapping and matters wherein human life be at stake." Supplemental Memo. for the United States, *Black* v. *United States,* 385 U. S. 26 (1966), in Hearings on S. 928, before the Subcom. on Admin. Prac. and Proc. of the Sen. Comm. on the Judiciary, 90th Cong., 1st Sess., pt. 1, at 34 (1967). The practice authorized was changed again, sharply, during the Johnson Administration, under Attorney General Ramsey Clark; wiretaps were allowed only as to matters "directly affecting the national security," not including such matters as organized crime. Hearings, *supra* at 56. In addition, further differences in practice existed under Attorneys General who, in principle, may have purported to follow the same policy with respect to wiretapping. For example, wiretapping has been allowed by some Attorneys General in connection with investigations completely unrelated to "national security."[36]

This history of prior use undercuts the Government's argument. To justify so grave a business as warrantless eavesdropping, a prior practice would have to convey unambiguously that the specific authority sought would, if granted, continue an accepted activity. Prior practice is patently ambiguous in this respect, because it includes periods during which the specific authority here claimed would have been disallowed (under Roosevelt and probably during the latter years of the Johnson Administration), as well as periods during which even broader authority was provided (under Truman, Kennedy and the early Johnson

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[36] *E.g., United States* v. *Kolod,* 390 U. S. 136 (1968) (interstate threat); *United States* v. *Granello,* 386 U. S. 1019 (1967) (tax); *United States* v. *O'Brien,* 386 U. S. 345 (1967) (customs); *United States* v. *Schipani,* 385 U. S. 372 (1966) (tax); *Black* v. *United States supra* (tax); *United States* v. *Borgese,* 235 F. Supp. 286 (S. D. N. Y.), *aff'd,* 372 F. 2d 950 (2d Cir. 1967) (gambling); *United States* v. *Baker,* 262 F. Supp. 657 (D. C. D. C. 1966) (larceny and tax).

years). That authority for wiretaps in domestic criminal cases existed during a substantial part of the period involved shows that the practice was lawless, and based on a theory different from the one now advanced by the Government.

The theory under which eavesdropping has in fact been conducted since 1940 demonstrates how radical a change the Government now suggests. Soon after President Roosevelt issued his 1940 directive, Attorney General Jackson authorized wiretaps in limited circumstances on the argument (implicit in Roosevelt's memorandum) that section 605 of the Communications Act precluded only interception *and* divulgence—that interception alone of telephone messages did not violate the Act. See 87 CONG. REC. 5764 (1940); Westin, *The Wire-Tapping Problem: An Analysis and A Legislative Proposal,* 52 Colum. L. Rev. 165, 168-69 (1952). Under this theory, it made no difference what crime or activity was being investigated; the Act allowed interception but not divulgence. Moreover, since *Olmstead* v. *United States, supra,* had held that the Constitution did not prohibit wiretapping, the only restraint on its use was the particular policy adopted by each President and Attorney General. This accounts for the diversity in practice with respect to the use of wiretapping for investigation. On the other hand, the theory contrived by Roosevelt and Jackson also accounts for the uniform acceptance by Attorneys General from 1940 until the present of the position that information obtained through wiretaps could not be used as evidence.

Prior to the present case, the Government has repeatedly conceded the inadmissibility of evidence obtained through wiretapping, even in espionage prosecutions. See, *e.g., United States* v. *Coplon,* 185 F. 2d 629 (2d Cir. 1950), *cert. denied,* 342 U. S. 926 (1952), and cases cited *supra,* n. 36.

As recently as 1967, the Department of Justice's wiretapping practice was authoritatively described, in formal representations to this Court and to Congress, as one that conferred upon "the director of the Federal Bureau of Investigation . . . authority to approve the installation of devices such as that in question for intelligence (and not evidentiary) purposes when required in the interest of internal security or national safety . . . ."[37] And Congress has repeatedly rejected the Department's persistent efforts to obtain authority to use the fruits of warrantless wiretapping. See discussion, *infra* at 57-58.

There are, therefore, two essential components of the Government's claim with respect to wiretapping practices as a precedent: the use of wiretapping to gather information; and the use of information so gathered, or its fruits, as evidence in criminal cases. As to the use of wiretapping to gather information, a wide variety of practices developed, none of which has received either legislative or judicial approval. As to whether the informational fruits of such wiretapping may be used as evidence— the issue in this case— there has indeed been a uniform practice. It is that information gathered through warrantless wiretaps may not be so used.

6. Congress has not recognized executive power to engage in warrantless electronic surveillance as conducted in this case.

The Government contends that, in section 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968, Congress "excepted from the requirement that a warrant be obtained for electronic surveillance certain categories of cases dealing with foreign and domestic intelligence and security." Gov't Brief, p. 28. But the clear language and

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[37] Supplemental Memo. for the United States, *Black* v. *United States, supra*. See the similar representations made to this Court and referred to in *Berger* v. *New York, supra* at 62.

legislative history of the statute refute this construction. Section 2511(3) does except from the requirements *of the 1968 Act* certain types of "national security" eavesdropping in which the President may have the power to engage. It does not confer any power. It merely provides that, if the President has any constitutional power to eavesdrop without warrant in certain areas, the Act should not be interpreted to disturb that power. To construe section 2511(3) as an affirmative grant of power would ignore Congress' persistent refusal since 1934 to recognize executive power to eavesdrop, and would raise grave constitutional questions, which should be avoided. See, *e.g., Kent* v. *Dulles,* 357 U. S. 116 (1958). Even assuming, however, that Congress did recognize executive authority to eavesdrop without warrant in certain situations, it is clear that this case involves none of the situations contemplated. The present search is invalid under any construction of the Act.

Since 1934, Congress has evidenced its opposition to wiretapping. In the Communications Act of that year, Congress outlawed all wiretaps, including those by federal law enforcement officials. Commencing in 1938 and repeatedly during the 1940's, 1950's and 1960's, the Department of Justice sought congressional authority to eavesdrop, especially in "national security" and organized crime cases.[38] In the early 1940's and 1950's most of the bills were introduced as war measures.[39] Other efforts sought authority in peacetime to wiretap with prior judicial supervision,[40]

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[38]The bills to revise § 605 introduced prior to 1958 are listed in Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 86th Cong., 1st Sess., pt. 4, pp. 781-1031 (1959).

[39]*E.g.*, 88 CONG. REC. A289 (1942); 88 CONG. REC. 4598 (1942).

[40]H. R. 8649, 83d Cong., 1st Sess. (1953); H. R. 762, 84th Cong., 1st Sess. (1955); S. 1086, 87th Cong., 1st Sess. (1961); H. R. 479, 82d Cong., 1st Sess. (1951); Hearings on Wiretapping for National Security before Subcomm. No. 3, House Committee on the Judiciary, on H. R. 408, 83d Cong., 1st Sess. 86 (1953).

and some sought to avoid prior judicial supervision, assertedly because of fear of information leaks and prejudicial delay.[41] Every bill proposed prior to 1968 either failed or was withdrawn, principally because of congressional concern as to the meaning of "national security,"[42] and the fear of further government abuse of any power conferred.[43]

By the Act of 1968, Congress for the first time expressly authorized electronic surveillance by federal, state and local authorities in a variety of situations involving certain specific criminal offenses. 18 U. S. C. § 2516(1)(a). Before eavesdropping is allowed, however, an application must be made to a judge stating, among other things, the grounds for believing that the subject should be intruded upon, and why electronic surveillance is necessary. 18 U. S. C. §§ 2516 and 2518. The judge may issue an order authorizing a surveillance where he finds "probable cause" to believe that one of several serious offenses has been or is about to be committed. The order must contain several particulars that narrow the power granted, and may not authorize interceptions for longer than necessary, and in no event for longer than 30 days. 18 U. S. C. § 2518(4)

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[41]Hearings on S. Rep. No. 1304, 76th Cong., 3d Sess. (1940); H. R. Rep. No. 2576, 76th Cong., 3d Sess. (1940); H. R. Rep No. 2048, 77th Cong., 2d Sess. (1942); Hearings on Wiretapping for National Security, Subcomm. No. 3 of the House Comm. on the Judiciary, 83d Cong., 1st Sess. (1953); Hearings on S. 2813 and S. 1495, before the Senate Comm. on the Judiciary, 87th Cong., 2d Sess. 16-17 (1962). See generally Theoharis & Meyer, *supra* at 764; Brownell, *supra* at 54; Rogers, *The Case for Wiretapping*, 63 Yale L. J. 792, 797 (1954).

[42]The early bills used the term "national defense" and in defining that term referred to "sabotage, treason, seditious conspiracy, espionage, violations of neutrality law, or in any other manner. . . ." Report of Committee of the Whole House, accompanying H. J. Res. 571, 76th Cong., 3d Sess. (1940); H. J. Res. 273, 77th Cong., 2d Sess. (1942).

[43]Theoharis & Meyer, *supra* at 759. Hearings on S. 928 before the Subcomm. on Administrative Prac. and Proc. of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., pt. 1, at 34 (1967).

and (5). An exception to this warrant procedure is allowed under § 2518(7) where any investigative or law enforcement officer, especially designated by the Attorney General or by the principal prosecuting attorney of any state or subdivision, "reasonably determines that—

> (a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and
>
> (b) there are grounds upon which an order could be entered under this chapter to authorize such interception.[44]

In such event the law enforcement officer may proceed to intercept communications, provided that a court order is sought within forty-eight hours after the interception begins. Interceptions obtained without an authorizing order issued in accordance with these provisions are deemed unlawful, and an inventory must be served on the subjects. 18 U. S. C. § 2518(8)(d).

Section 2511(3) must be read in conjunction with the requirements of the 1968 Act. The section provides that "nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U. S. C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against" certain foreign and internal threats to the nation's security. Congress clearly did not contemplate that a warrant could constitutionally be dispensed

[44]Significantly, the provisions creating this "emergency" power came closest to defeat, prevailing in the Senate by only a seven-vote margin: 44-37. 114 Cong. Rec. 14699 (1968).

with whenever an activity that potentially threatened our security was being investigated. It specifically provided for judicial supervision in connection with investigations of espionage, sabotage and treason, for example, and allowed warrantless surveillance only in emergencies, for no more than a 48-hour period. At most, therefore, the provision can be interpreted as a neutral pronouncement, reflecting no congressional judgment on the content of the President's "constitutional power." This interpretation is strongly supported by the following authoritative exchange between Senators Hart, McClellan and Holland, 114 CONG. REC. 14751 (1968), in connection with the phrase "clear and present danger to the structure or existence of the Government":

> MR. HART. [I]f, in fact, we are here saying that so long as the President thinks it is an activity that constitutes a clear and present danger to the structure or existence of the Government, he can put a bug on without restraint, then clearly I think we are going too far. . . .
>
> MR. HOLLAND. Mr. President, I think that the distinguished Senator is unduly concerned about this matter.
>
> The section from which the Senator has read does not affirmatively give any power. It simply says, and I will not read the first part of it because that certainly says that nothing shall limit the President's constitutional power, but the part from which the Senator has read continues in the same spirit. It reads:
>
> > 'Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against.'

> And so forth. We are not affirmatively conferring any power upon the President. We are simply saying that nothing herein shall limit such power as the President has under the Constitution. If he does not have the power to do any specific thing, we need not be concerned. We certainly do not grant him a thing.
>
> There is nothing affirmative in this statement.
>
> MR. MCCLELLAN. Mr. President, we make it understood that we are not trying to take anything away from him.
>
> MR. HOLLAND. The Senator is correct.
>
> MR. HART. Mr. President, there is no intention here to expand by this language a constitutional power. Clearly we could not do so.
>
> MR. MCCLELLAN. Even though intended, we could not do so.
>
> MR. HART. A few days ago I wondered whether we thought that we nonetheless could do something about the Constitution. However, we are agreed that this language should not be regarded as intending to grant any authority, including authority to put a bug on, that the President does not have now.

Therefore, Congress in effect said in section 2511(3) that, if the President does possess power to eavesdrop without a warrant in some circumstances to protect against an overthrow of the government by force or against any other clear and present danger to the structure or existence of the government, then neither section 605 of the 1934 Act nor the relevant provisions of the Omnibus Crime Control and Safe Streets Act of 1968 should be construed to limit such power. Under this most natural reading, Congress neither granted nor recognized any specific executive power to eavesdrop for the purposes described.

To the extent that section 2511(3) reflects a congressional judgment as to the areas in which the President may have power to eavesdrop without warrants, it strongly indicates that no such power extends to strictly domestic affairs. The Senate Committee Report contains the following explanation of the national security provisions, expressly distinguishing between "the field of domestic affairs," on the one hand, and "international relations and internal security," on the other:

> NATIONAL SECURITY
>
> It is obvious that whatever means are necessary should and must be taken to protect the national security interest. Wiretapping and electronic surveillance techniques are proper means for acquisition of counter intelligence *against the hostile action of foreign powers.* Nothing in the proposed legislation seeks to disturb the power of the President to act in this area. Limitations that may be deemed proper in the field of *domestic affairs* of a nation become artificial when *international relations and internal security* are at stake.

S. Rep. No. 1097, 90th Cong., 2d Sess. 69 (1968). (Emphasis added.)[45]

Section 2511(3) provides no support for the Government in this case for another reason. It provides that, "[t]he contents of any wire or oral communication intercep-

[45] In its effort to support a broad reading of section 2511(3), the Government omitted from an extensive reference to the Senate Committee Report, Gov't Brief, p. 29, the highly significant, italicized words in the following sentence: If evidence secured through eavesdropping could not be used, "individuals seeking to overthrow the Government, *including agents of foreign powers and those who cooperate with them,* could not be held legally accountable when evidence of their unlawful activity was uncovered incident to the exercise of this power by the President." S. Rep. No. 1097, 90th Cong., 2d Sess. 94 (1968). (Emphasis added.)

ted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding *only where such interception was reasonable* . . . ." (Emphasis added.) This provision accepts the principle that, whatever may be the President's power to gather information, he cannot use as evidence information gathered in violation of the Fourth Amendment. As to what is reasonable, Congress explicitly stated that the eavesdropping provisions of the Act were "drafted to meet . . . [the] standards [delineated in *Berger* v. *New York*] and to conform with *Katz* v. *United States* . . . ." S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968). The Government relies on a statement in the Senate Committee Report to the effect that the reasonableness of an interception should be "based on an *ad hoc* judgment taking into consideration all of the facts and circumstances of the individual case, which is but the test of the Constitution itself (*Carroll* v. *United States*, 267 U. S. 132 (1925))." *Id.* at 94. This statement was not meant to disturb the rule in *Katz*. *Carroll* v. *United States* rests on a recognized exception to the warrant requirement, based on practical law-enforcement needs. The Senate Committee's reference simply sought to reinforce the general proposition stated in section 2511(3) that *the Act* should not be read to preclude warrantless surveillance where the Constitution would allow it. Thus the Report continues, after referring to the standard in *Carroll*: "The possibility that a judicial authorization for the interception could or could not have been obtained *under the proposed chapter* would only be one factor in such a judgment." *Id.* (Emphasis added.) The District and Circuit Courts did not rely on the 1968 Act in declaring the fruits of the present search inadmissible. Rather, they relied on the constitutional principle implicit in *Carroll*—that warrants are generally required—and on an examination of the facts and circumstances as alleged by the Attorney General, which

revealed no basis for an exception to the warrant requirement.

Whatever interpretation may be placed on section 2511 (3), the present search is invalid. The Government claims to have acted under that part of the statute that leaves undisturbed the President's power to take measures "to protect the United States against the overthrow of the Government by force or by other unlawful means, or against any other clear and present danger to the structure or existence of the Goverment." But the Attorney General did not allege facts or conclusions sufficient to establish that he acted pursuant to this provision. His affidavit stated that the wiretaps "were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." Gov't Brief, p. 3. First, the statutory provision relied on says nothing about authority to gather "intelligence information" in connection with internal security; intelligence information gathering is referred to only in connection with activities of foreign powers. Second, the affidavit fails to allege either that the efforts against which wiretapping was directed sought "the overthrow of the Government by force or other unlawful means," or that the efforts posed "any other clear and present danger" to the Government. Instead, the affidavit simply refers to "attempts" or "domestic organizations" to attack and subvert the government. The statutory language that the Attorney General omitted from his affidavit is highly material, since it at least requires him to allege in good faith that he believed the "attempts" involved dangerous activities. The defect in his affidavit is analogous to the failure by an affiant seeking a conventional search warrant to allege that a crime had been, or was being, committed. It is clearly fatal to the search's

legality. See, *e.g.*, *Thomas* v. *United States*, 376 F. 2d 564, 567 (5th Cir. 1967).

7. Whatever authority the President may have to utilize warrantless electronic surveillance with respect to the activities of foreign powers, there is no support for such surveillance of purely domestic activities.

In a final effort to justify the inordinate power it seeks, the Government assumes that the Attorney General could order warrantless electronic surveillance for foreign intelligence purposes and then use the information obtained as evidence. It then argues that "no sharp and clear distinction can be drawn between 'foreign' and 'domestic' information," and that any effort to "compartmentalize national security into rigid separate segments of 'foreign' and 'domestic' ignores the realities . . ." *Id.* at 34.

The Government assumes too much. Whether the fruits of warrantless wiretaps used to gather foreign intelligence may be used as evidence is a question of great importance and difficulty. This Court refused an opportunity to review any aspect of the issue in *United States* v. *Clay*, 430 F. 2d 165 (5th Cir. 1970), *reversed on another ground*, 403 U. S. 698 (1971). In fact, the Fifth Circuit in *Clay* implicitly recognized that, whereas foreign intelligence surveillance is not prohibited by the Communications Act of 1934, its fruits may be inadmissible as evidence.[46] Also, the District and Circuit Courts in the present case did not recognize, explicitly or implicitly, that foreign intelligence eavesdrop-

[46]The court relied on section 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968 in rejecting the contention that foreign intelligence wiretaps were forbidden. 430 F. 2d at 171. It held that the defendant could not see the log involved, because it had properly been determined that the tap had been made for foreign intelligence gathering, *and* because "no use of the fifth log was made in this case against defendant. It played no part in his conviction and our *in camera* scrutiny thereof thoroughly convinces us that defendant was not prejudiced thereby." *Id.*

ping can be used to gather admissible evidence. They assumed it, *arguendo*, in rejecting the contention that there is a national security exemption from the warrant requirement in wholly domestic situations. See Transcript of Record, pp. 30-32, 63-64. Indeed, the Solicitor General only recently conceded, in oral argument, that such surveillance is unlawful, a concession this Court refused to accept. See *Giordano* v. *United States*, 394 U. S. 310, 313 n.1 (1969).

It is appropriate here, for argument's sake, to assume that the fruits of electronic surveillance undertaken to protect against foreign threats are admissible as evidence in criminal cases, even where such surveillance fails to comply with traditionally imposed constitutional limitations. It is imperative, however, to do so tentatively and with caution. For if, as the Government contends, it is impossible to distinguish between foreign and domestic threats to the nation's security, then the assumption that evidence is admissible though secured through warrantless eavesdropping in foreign affairs must be rejected. If no acceptable rationale can be developed for allowing prosecutorial use of intelligence gathering eavesdropping directed at foreign powers and their agents, while disallowing such use of intelligence gathering eavesdropping directed at domestic activities, then Fourth Amendment principles require that the prosecutorial use of all such eavesdropping be proscribed. In this, as in every other situation in which extraordinary power has been granted to the President in the field of foreign affairs, it must only be done if the foreign aspect of the power sought is distinguishable from other aspects that the law requires to be governed by normal standards. Otherwise, the President's special powers would swallow up the fundamental rights written to protect Americans (though not foreign governments) from the exercise of arbitrary power.

The fact is that, contrary to the Government's present contention, the distinction between foreign and domestic

activities is sufficiently viable to justify deferring the question whether electronic intelligence gathering aimed at foreign powers or activities may also be used to collect evidence for criminal trials. In *United States* v. *Curtiss-Wright Export Co., supra,* for example, this Court was presented with the issue whether a resolution of Congress authorizing the President to institute at his discretion a prohibition against the sale of arms to foreign belligerents was an unconstitutional delegation of legislative authority. The Court assumed, without deciding, that the resolution would have been invalid if it had been confined to internal affairs, and concluded that, even so, it was valid as a delegation relating to matters "entirely external to the United States, and falling within the category of foreign affairs." 299 U. S. at 313. To reach this conclusion the Court adopted the position, *id.* at 319, that there exist fundamental differences between the powers of the federal government in respect to foreign and domestic affairs:

> Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.

In *Curtiss-Wright,* and in the many other decisions where this Court sustained an especially broad exercise of power in foreign or external matters, it did so because it concluded (as the government undoubtedly there contended) that the President's authority in foreign matters was especially broad. See, *e.g., United States* v. *Belmont, supra* at 330-31; *United States* v. *Pink, supra* at 229-30; *Chicago & So. Air*

Lines v. *Waterman Steamship Corp.*, *supra* at 109-11; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302 (1918). A necessary premise for such a conclusion is that the distinction between foreign and domestic affairs has vitality and is a serviceable guideline for the exercise of power by the different branches of the federal government. See also *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra* at 635 n. 1 (concurring opinion of Jackson, J.).

Federal statutes and judicial decisions in the area of national security specifically reflect the viability of a distinction between foreign and domestic threats. For example, the Subversive Activities Control Act requires registration by Communist organizations which, among other things, are "substantially directed, dominated, or controlled by the *foreign* government or *foreign* organization controlling the world Communist movement . . . ." 50 U. S. C. § 782(3). (Emphasis added.)[47] In rejecting the argument that the registration requirement of the Act violated the defendant's First Amendment rights, the majority opinion by Mr. Justice Frankfurter in *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1, 104 (1961), stressed the foreign nature of the threat, and the correspondingly greater freedom which must be given to Congress:

> It is argued that if Congress may constitutionally enact legislation requiring the Communist Party to register, to list its members, to file financial statements, and to indentify its printing presses, Congress may impose similar requirements upon any group which pursues unpopular political objectives or which expresses an unpopular political ideology. Nothing which we decide here remotely carries such an im-

[47] See also the distinction between foreign and domestic affairs drawn in the Foreign Agents Registration Act, 22 U. S. C. §§ 611-21, and 18 U. S. C. § 2386.

plication. The Subversive Activities Control Act applies only to *foreign-dominated* organizations which work primarily to advance the objectives of a world movement controlled by the government of a *foreign* country.

Particularly pertinent in this context is the American Bar Association's adoption of the very distinction that the Government here claims cannot be made,[48] and that it did so with awareness and a belief in the distinction's tenability.[49] Furthermore, Congress evidenced its conviction that the distinction was both necessary and could be drawn by providing separately in section 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968 that the

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[48]Part 3.1 of ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Electronic Surveillance*, p. 4, 120-21 (1971), provides that, "The use of electronic surveillance techniques by appropriate federal officers for the overhearing or recording of wire or oral communications to protect the nation from attack by or other hostile acts of a foreign power or to protect military or other national security information against *foreign* intelligence activities should be permitted subject to appropriate Presidential and Congressional standards and supervision." (Emphasis added.)

[49]Mr. Lewis F. Powell, then a member of the Special Committee to consider amendments, explained the distinction during the floor debates:

> I call the House's attention to the fact that 3.01 and 3.02, which relate to national security, provide for a national security exception to the court order and warrant procedure which is the bedrock provision of the standards with respect to ordinary cases.
>
> It is essentially [sic] in this debate . . . to understand that this exception relates only to cases where national security is threatened by *foreign* powers or activities. The exception does not relate to domestic threats or subversion.
>
> This distinction is explicitly clear from the standard and from the commentaries. The suggestion that domestic security may be involved is completely beside the point of this discussion.

Transcript of Record, Minutes of House of Delegates, p. 71 (Feb. 9, 1971). (Emphasis added.)

President's constitutional powers with respect to foreign activities *and* with respect to internal security should not be affected by the Act. The recitation of those powers in the same statutory provision does not evidence a legislative belief that they cannot be distinguished. To the contrary, had Congress so believed, it would more reasonably have been expected to lump both areas of activity into one category, such as "national security." But it did not. The statute's language is significantly different in connection with the foreign activities described than with the domestic activities described. Each type of activity is dealt with in a separate sentence. As to internal-security matters, the Presidential power left unaffected relates to the use of *unlawful* means which pose a *clear and present danger;* no such limitations are suggested in connection with the threats of foreign powers who, unlike persons engaged in domestic activities, are not subject to normal criminal sanctions.

The Government itself only recently contended that a distinction could be made between its eavesdropping activities aimed at foreign powers and those aimed at uncovering domestic threats. In its Petition for Rehearing in *Ivanov* v. *United States*, No. 11, 1968 Term, p. 1, filed March 1969, the Government requested that this Court reconsider that portion of its decision "which relates to the disclosure to defendants of the results of electronic surveillance relating to the gathering of foreign intelligence information . . . ." There, the Government managed ably to state, *id.* at 2-3, the distinction it now claims this Court is incapable of formulating:

> In presenting this petition, we do not use the term 'national security.' We recognize that that phrase can be given a broad meaning covering such matters as organized crime and internal security. Our submission here is limited to the narrow category of the gathering of foreign intelligence information, i.e.,

> matters affecting the external security of the country. . . .
>
> Within that narrow compass, we believe that the decision in these cases poses sufficiently serious problems to the protection of that security that it should be modified to provide for in camera scrutiny by the district court before records of surveillance made in such gathering should be disclosed to defendants.

Finally, to illustrate its argument that domestic and foreign intelligence gathering are inseparably intertwined activities, the Government notes that several hundred international telephone calls were intercepted during the present tap. Gov't Brief, p. 30 n.13. This observation, based on incomplete information never introduced in the record, is neither an adequate nor a timely allegation that the wiretap was ordered to protect to any extent against the activities of foreign powers. The Attorney General's affidavit filed in the District Court specifically recites that the wiretaps involved were being used to gather information "deemed necessary to protect the nation from attempts of *domestic organizations* to attack and subvert the existing structure of the Government." *Id.* at 3. (Emphasis added.) And the Government noted in the District Court that the issue presented "involves the legality only of those electronic surveillances deemed necessary to gather intelligence information to protect the nation from internal attack and subversion . . . ." Gov't Memorandum, filed Dec. 10, 1970, p. 6. Therefore, whatever ambiguities may exist with respect to the difference between surveillance directed at foreign as compared to domestic activities, no difficulty on this score exists here. The tap involved was aimed at domestic activities, and it cannot be supported by the argument that a similar tap on foreign activities would be lawful.

II.

THE DISTRICT COURT PROPERLY REFUSED TO DETERMINE *IN CAMERA* WHETHER THE FRUITS OF THE INTERCEPTIONS ARE ARGUABLY RELEVANT TO THE PROSECUTION.

The Government concedes that *Alderman* v. *United States*, 394 U. S. 165 (1969), requires that the relevance of illegally seized evidence to a prosecution be determined with the full participation of a defendant aggrieved by the search. See *Nardone* v. *United States*, *supra*, 308 U. S. at 341. It argues, however, that *Alderman* should be reconsidered, at least as it applies to "national security" cases. It is "adequate" protection for the defendant in this case to allow an *in camera* determination, the Government argues, because his conversation was intercepted "by happenstance." On the other hand, we are told, many reasons exist for not disclosing material that a judge concludes is not arguably relevant, including the unfortunate possible effects of such disclosure on innocent persons; possible interference with other federal and state prosecutions; and the "dilemma" allegedly forced upon the Government to decide between disclosing information that may be secret or embarrassing, and dropping the case and thereby possibly immunizing the individual from any future prosecution. Moreover, Congress is said to have unambiguously opposed automatic disclosure in two recent statutes, consequently making even stronger the case for reconsideration. *Alderman* should be viewed, the Government contends, as an exercise of this Court's supervisory power, which is subject to legislative overruling. But even if viewed as a constitutional decision, reconsideration is claimed appropriate and necessary.

A. The Decision in *Alderman* Is of Constitutional Dimension and Established the Proper Procedure for Resolving the Issue of Whether Illegally Seized Evidence Has Tainted the Government's Case.

The Court in *Alderman* carefully considered the interests at stake in deciding that an adversary proceeding was required. That it "weighed" arguments against disclosure does not signify that the decision had no constitutional basis. Quite the contrary. Careful consideration of all countervailing factors indicates only that the decision reached is sound, whatever may have been the basis upon which the Court proceeded.

Alderman rests squarely on the Fourth Amendment. When this Court rests a decision on its supervisory power over the federal courts it does so unambiguously. *E.g., McCarthy* v. *United States*, 394 U. S. 459 (1969); *Marshall* v. *United States*, 360 U. S. 310, 313 (1959); *Mallory* v. *United States*, 354 U. S. 449 (1957); *Offut* v. *United States*, 348 U. S. 11, 13 (1954); *McNabb* v. *United States*, 318 U. S. 332, 340 (1942). To do otherwise would create undesirable uncertainty as to a decision's applicability in the state courts, the propriety of collateral attacks based on the principle announced, and the scope of Congress' authority to legislate on the issue. In *Alderman* the Court did not mention its supervisory power, and made no hint that its decision would apply only in the federal courts. It concluded, in fact, that an *in camera* proceeding on the issue of relevance was so patently deficient, as compared to an adversary proceeding, that it would "be unable to provide the scrutiny *which the Fourth Amendment exclusionary rule demands.*" 394 U. S. at 184. (Emphasis added.) This enlightening language was repeated in *Taglianetti* v. *United States*, 394 U. S. 316, 317 (1969), where the Court distinguished *Alderman* "because the *in camera* procedures at issue there [in *Alderman*] would have been an inadequate

means to safeguard a defendant's Fourth Amendment rights."

In camera adjudication is constitutionally inadequate for determining the relevance of illegally seized evidence. The trial judge, by definition neutral and detached, is obviously unfamiliar with the facts behind a case and may therefore fail to see relevance where a defendant could convincingly demonstrate its existence.[50] Of course, "adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands." 394 U. S. at 184. Implicit in the need for an adversary proceeding to determine taint, moreover, are the accused's Sixth Amendment rights of confrontation and cross-examination which should be limited upon proof of only the "clearest and most compelling considerations." *Dennis* v. *United States*, 384 U. S. 855, 973 (1966). The Court of Appeals in this case examined the material submitted by the Government and concluded that it could not be certain whether the Government had derived prosecutorial benefit from this illegal search. 444 F. 2d at 668.

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[50] As Mr. Justice White reasoned for the Court in *Alderman*, *supra* at 182 (footnotes omitted):

> An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the in camera judgment of the trial court to identify those records which might have contributed to the Government's case.

The Government refers to situations in which nondisclosure has heretofore been found acceptable. Most of these were specifically considered in *Alderman*, however, and distinguished because "in both the volume of the material to be examined and the complexity and difficulty of the judgments involved, cases involving electronic surveillance will probably differ markedly from those situations . . . where *in camera* procedures have been found acceptable to some extent." 394 U. S. at 182 n.14.[51] It is far easier, for example, for a judge to determine what evidence in the prior statement of a witness is relevant to the witness' direct examination, than to determine the relevance of a recorded conversation to a prosecution. Even with the helpful focus of testimony on direct, however, the Court noted that it is not "realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legititmate purposes, however conscientiously made, would exhaust the possibilties," citing *Dennis* v. *United States, supra*, 384 U. S. at 975. Other situations in which nondisclosure was allowed relate to whether an *in camera* proceeding is appropriate to settle the legality of a surveillance, see *Giordano* v. *United States, supra* at 314 (concurring opinion of Stewart, J.), and to whether it is adequate for a District Court to identify "only those instances of surveillance which petitioner had standing to challenge . . ." after doublechecking "the accuracy of the Government's voice identifications," *Taglianetti* v. *United States, supra* at 317. These decisions, virtually contemporaneous with *Alderman*, stand only for the proposition that *Alderman* requires no more than the disclosure of illegally seized

[51] The Court referred to *Dennis* v. *United States, supra* (disclosure of grand jury minutes subject to *in camera* deletion of "extraneous material"); *Palermo* v. *United States*, 360 U. S. 343 (1959) (disclosure of documents to defense under the Jencks Act, 18 U. S. C. § 3500); and *Roviaro* v. *United States*, 353 U. S. 53 (1957) (disclosure of informant's identity).

evidence to defendants with standing. It is conceded here that defendant has standing, and we are assuming in this argument that the seizure was illegal.

The dangers referred to by the Government are largely imagined, and of its own making. We of course share the Government's commendable sensitivity for the rights of innocent persons whose conversations may be disclosed or who may be referred to in such conversations, a sensibility the Goverment unaccountably suppressed in approaching the principal question before this Court. It is also of grave concern that important federal and state prosecutions may be adversely affected by disclosures of illegally seized evidence. No evidence of such consequences is cited, however, where a protective court order was obtained, and the incidents referred to by the Government are unpersuasive. The Court in *Alderman* made it emphatically clear that its decision did not mean "that any defendant will have an unlimited license to rummage in the files of the Department of Justice." 394 U. S. at 185. "It must be remembered that disclosure will be limited to the transcripts of a defendant's own conversations and of those which took place on his premises. It can be safely assumed that much of this he will already know, and disclosure should therefore involve a minimum hazard to others." *Id.* at 184-185. The Court of Appeals in this case took pains to make clear that only the specific conversations in which the defendant was overheard should be disclosed. 444 F. 2d at 669. As to the possibility that disclosure may hurt other persons, "the trial court can and should, where appropriate, place a defendant and his counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect. See Fed. Rules Crim. Proc. 16(e). We would not expect the district courts to permit the parties or counsel to take these orders lightly." *Id.* at 185.

The most effective way to protect the innocent from harmful disclosures would be to spare them from illegal intrusions. The most effective way to avoid undermining important criminal cases would be to gather intelligence information through constitutionally permissible means. And the way out of the dilemma in which the Government finds itself—to disclose possibly embarrassing or secret material, or to dismiss prosecutions—is to avoid it entirely. The alleged dangers to innocent parties in criminal cases, and the dilemma of disclosing or dismissing, are always present when the Government illegally seizes material that is relevant to a prosecution. See *Alderman, supra* at 181. The Government can avoid the marginal added dangers caused by disclosure to determine relevance by refraining from the illegal conduct that triggers such inquiries.

That the search here involved assertedly relates to the "national security" is irrelevant. This Court has consistently held that the Government must choose in such cases between disclosure and dismissal of the prosecution. "[I]t is unconscionable to allow . . . [the Government] to undertake prosecution and then invoke its governmental privilege to deprive the accused of anything which might be material to his defense . . . ." *Jencks* v. *United States,* 353 U. S. 657, 670 (1957). See also *United States* v. *Coplon, supra.* In *Alderman,* the Court reaffirmed this rule, not only with respect to internal security matters, but also as to defendants charged with spying for a foreign power. See *Ivanov* v. *United States* and *Butenko* v. *United States,* decided with *Alderman.* The Government itself, in its Petition for Rehearing in *Ivanov,* p. 1, explicitly disavowed requesting *in camera* hearings as to relevance in national security cases, but limited its request to "that portion of the decision which relates to the disclosure to defendants of the results of electronic surveillance relating to the gathering of foreign intelligence information, which term we use to

include the gathering of information necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage."

It is, in fact, especially important that the exclusionary rule be fully enforced through the adversary system in national security cases. Doubts concerning the wisdom or effectiveness of exclusion in ordinary criminal cases are inapposite in the present context. See generally *Bivens* v. *Six Unknown Named Agents, supra* at 411 (dissenting opinion of Burger, C. J.), and the authorities collected in the appendix. We are not dealing here with a policeman's "blunder," or with other undeterrable law enforcement efforts. Compare *People* v. *Defore*, 242 N. Y. 13, 21, 23-24, 150 N. E. 585, 587-88 (1926) (Cardozo, J.). "Surreptitious electronic surveillance . . . is usually the product of calculated, official decision rather than the error of an individual agent of the state," *Alderman* v. *United States, supra* at 203 (opinion of Fortas, J.), and this Court's order requiring disclosure of all illegally seized evidence to aggrieved defendants will certainly cause a considered reappraisal of wiretapping practices in light of the interest in successfully prosecuting offenders. Furthermore, to require the courts to decide relevance *in camera* would force upon them a role especially threatening to their continued neutrality when the Government is claiming that disclosure will prejudice national security. Public hearings, on the other hand, are favored in our system of justice as "an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U. S. 257, 270 (1948). Rather than pose a threat to the public interest as the Government claims, they should enhance public awareness of how the government exercises powers that are highly threatening to political freedom. Any embarrassment that stems from a disclosure of the fruits of unjustifiable eavesdropping need not command the

sympathetic attention of this Court, See, *e.g., United States* v. *Clay, supra* (wiretap of Dr. Martin Luther King, Jr.). Drawing the line between what may threaten the nation and what may embarrass or threaten a particular administration is a task that no court should undertake.

B. Congressional Policy Supports the Disclosure Rule of *Alderman*.

The Government argues that Congress has indicated its desire to overrule *Alderman* in the Omnibus Crime Control and Safe Streets Act of 1968, and in the Organized Crime Control Act of 1970. The 1970 Act is inapplicable, and the clear language of the 1968 Act fails to support the Government's claim. In fact, the 1968 Act, and other statutory provisions, indicates that Congress favors disclosure to determine relevancy, especially of a defendant's illegally seized statements.

Section 2518(10)(a) of the Omnibus Crime Control and Safe Streets Act of 1968 provides that an aggrieved person may move to suppress evidence obtained through an electronic interception that failed to comply with the Act's procedures and standards for such surveillance. The section's effect is just the opposite of what the Government contends. It states that the judge, "*upon the filing of such motion* [to suppress] by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice." (Emphasis added.) This sentence (when read in full, rather than as the Government quoted it, Gov't Brief, p. 41), clearly refers to how the judge should behave immediately after a motion to suppress is filed, and before its validity has been determined. The sentence authorizes some disclosure, even on the issue of legality, to the extent the judge feels

disclosure is in the interests of justice. The section-by-section analysis in the Senate Report, referred to by the Government, reinforces the clear meaning of the statutory language. It states that, *"Upon the filing of such a motion to suppress,* the court may make available to the person or his counsel such portions of the intercepted communications or evidence derived therefrom as the court determines to be in the interest of justice." S. Rep. No. 1097, 90th Cong., 2d Sess. 106 (1968). (Emphasis added.) Then it states that access should be limited for various reasons, see Gov't Brief, p. 41 n.19, concluding that "the privacy of other people [should not] be unduly invaded in the process of litigating *the propriety of the interception* of an aggrieved person's communications." S. Rep. No. 1097, *supra.* (Emphasis added.)

Section 2518(10)(a) also provides that, "If the motion [to suppress] is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter." This provision is clearly a reference back to section 2515, which provides that "no part of the contents of such [illegally obtained] communication *and no evidence derived therefrom* may be received in evidence in any trial . . ." (Emphasis added.) This provision adopts the taint rule enforced in *Alderman,* and in no way suggests that it should be applied in a less rigorous manner.

The Government's argument based on section 2518(8)(d) is even further off the mark. That section requires that an inventory be served on persons whose communications are intercepted, except that it allows the inventory to be postponed for "good cause." The section also states: "The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in

the interest of justice." This provision emphasizes the liberality of Congress in allowing disclosure. It says that an aggrieved person must be informed that his communications have been intercepted, and that he may be supplied with parts of the communications, even before he has been prosecuted, or has filed a motion to suppress, or has demonstrated the interception's illegality. This goes much further than *Alderman*, which requires disclosure, but only after the aggrieved person has proven, through a motion to suppress, that the search was illegal.

The Government's arguments under section 2518 are, of course, diversionary. The Attorney General claims to have acted in accordance with section 2511(3) which provides that the Act should not be deemed to affect the President's constitutional power to gather national security information. Section 2511(3) indicates, if anything, that the Government is wrong in its attack on *Alderman*. That section provides for the use at trials of evidence collected through "national security" eavesdropping only where the interception was "reasonable." Disclosure of the evidence is not "otherwise" allowed, "except as it is necessary to implement" the President's power. This provision implicitly requires, rather than precludes, disclosure in a relevancy hearing. First, unless relevancy is fully tested, it is possible that intercepted evidence will be used at a trial, directly or indirectly, even though its seizure was unreasonable. The statute allows the use of such evidence only when reasonably seized. Second, when Congress passed the Crime Control Act it was already established that the arguable relevance of evidence illegally seized by wiretap has to be tested through the adversary system. Thus, in *Nardone* v. *United States, supra,* 308 U. S. at 339, the defendant appealed from the trial court's refusal to allow him "to examine the prosecution as to the uses to which it had put the [illegally seized] information . . . ." This Court unanimously reversed, holding that, once an accused had proved

"that wiretapping was unlawfully employed . . ., the trial judge must give opportunity, however closely defined, to the accused to prove that a substantial portion of the case against him was a fruit of a poisonous tree." *Id.* at 341. See *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392 (1920). In this context, it is "necessary to implement" the power to eavesdrop for national security purposes that disclosure be made when the Government seeks to prosecute someone upon whom it has eavesdropped illegally and who has standing to challenge that unlawful action.

The Government itself admits that section 3504(a)(2) of the Organized Crime Control Act of 1970 is inapplicable to this case. The statute applies only to unlawful searches occurring prior to June 19, 1968, and the Government concedes the search in this case occurred after June 1968. Gov't Brief, p. 42. In the legislative debates on this section there were several indications that some Congressmen believed that section 3504(a)(2) was intended to overrule *Alderman* as to all pre-June 1968 searches and that the Omnibus Crime Control and Safe Streets Act of 1968 had so provided for all post-June 1968 searches. *Id.* at 43-46. As shown above, however, these Congressmen were wrong about the purpose and language of the 1968 Act. There is, moreover, a perfectly reasonable explanation as to why Congress allowed *Alderman* to apply in all post-June 1968 decisions, but in no pre-June 1968 decisions. It is that no system had been developed prior to the 1968 Act to enable the federal government to eavesdrop and use the evidence obtained. After the 1968 Act, however, a structure for eavesdropping was established, and the Government's failure to comply with it might reasonably have been viewed as more serious than illegality prior to the Act, thereby warranting full enforcement of the exclusionary rule. In any event, the 1970 Act is inapplicable to this case, and the intentions of some of its proponents cannot substitute for an adequately precise overruling of the procedures set up in the 1968 Act. Any doubt

on this score should be resolved against a construction that would raise grave constitutional questions.

It is appropriate to add that in 1966 Congress amended Rule 16 of the Federal Rules of Criminal Procedure to permit courts to order "the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government . . . ." This revised rule was intended to expand the scope of discovery, *e.g.*, *Walsh* v. *United States*, 371 F. 2d 436 (1st Cir), *cert. denied*, 387 U. S. 947 (1967), to the point where it grants to the defendant an almost automatic, absolute right to discover his own written or recorded statements, *United States* v. *Longarzo*, 43 F. R. D. 395 (S. D. N. Y. 1967); *United States* v. *Federman*, 41 F. R. D. 339 (S. D. N. Y. 1967). See Rezneck, *The New Federal Rules of Criminal Procedure*, 54 Geo. L. J. 1276, 1277 (1966). Recorded statements are within the rule. *E.g.*, *United States* v. *Nolan*, 423 F. 2d 1031 (10th Cir.), *cert. denied*, 400 U. S. 848 (1970); *United States* v. *Crisona*, 416 F. 2d 107 (2d Cir. 1969), *cert. denied*, 397 U. S. 961 (1970). The only limit on discovery of such statements is Rule 16(e), see *United States* v. *Isa*, 413 F. 2d 244 (7th Cir. 1969), to which the Court referred in *Alderman* as the basis upon which protective orders could be obtained. "[T]he only defensible interpretation is that discovery under rule 16(a) of the kinds of materials there listed is to be a matter of right, subject only to the power of the court to issue protective orders in proper cases, which is explicitly spelled out under subsection (e) of the rule." Comments of Charles A. Wright, at the Twenty-Ninth Annual Judicial Conference of the Third Judicial Circuit, 42 F. R. D. 437, 567 (1966). Given this controlling congressional policy, and the strong considerations for an adversary proceeding, this Court should reaffirm its recent decision in *Alderman*.

CONCLUSION

The Government's position in this case stems from its resolve to engage in searches so broad in conception, so baseless in instigation, and so limitless in execution that every historic protection built into the Fourth Amendment must be ignored to allow them to occur. It is because the Government wants to search indiscriminately that it seeks exemption from the rules of particularity. It is because the Government wants to investigate when no crime has been committed or is threatened that it deems superfluous the requirement of probable cause. And it is because the the Government wants to act without supervision and without justifying its actions that it would denigrate the warrant requirement.

For countless generations, government officials have seized upon periods of stress to claim inordinate powers, intolerable in a free society. It is the mission of this Court to hold now, as it has in the past, that the processes of justice do not begin only when injustice has been done, but seek to prevent injustice from being done at all. This is the ancient and high purpose of the warrant, not to correct arbitrary intrusion of the government into the private affairs of its citizens, but to forestall it. This Court should reaffirm that purpose.

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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*At the request of Judge Damon J. Keith, counsel was designated by the State Bar of Michigan to represent Judge Keith in these proceedings. Other than to designate counsel, the State Bar is not involved in this matter and the arguments made and positions taken herein should not be ascribed to it.

APPENDIX

U. S. Constitution:

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be . . . compelled in any criminal case to be a witness against himself . . . .

Statutes:

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 (82 STAT. 197, 18 U. S. C. 2510 *et seq.*):

§ 2511(3): Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U. S. C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack

or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceedings only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

§ 2515: Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

COMMUNICATIONS ACT OF 1934, 48 STAT. 1103, 47 U. S. C. A. § 605:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect,

or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.